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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-552

LOUIS B. SCHWARTZ and BERNARD L. SEGAL,

Petitioners,

—v.—

DEFENDER ASSOCIATION OF PHILADELPHIA,

Respondent.

(In re Amendments of Articles of Incorporation of Defender Association)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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(In re Amendments of Articles of Incorporation of Defender Association)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The petitioners, Louis B. Schwartz and Bernard L. Segal, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered in this proceeding on July 2, 1973.

Opinions Below

The judgment and opinion of the Supreme Court of Pennsylvania, together with the dissenting opinion, are reported in 307 A.2d 906, and appear in the Appendix, *infra*, pp. 1a-35a. The per curiam judgment and dissenting opinion in the Superior Court of Pennsylvania are reported in 219 Pa. Super. Ct. 309, 279 A.2d 240 (1971), and are set forth in

the Appendix, *infra*, pp. 36a-53a. The Adjudication of the Court of Common Pleas of Philadelphia is set forth in the Appendix, *infra*, pp. 54a-72a.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). The judgment of the Supreme Court of Pennsylvania having been entered on July 2, 1973, this petition for certiorari was filed within 90 days of that date.

Questions Presented

1. Are the federal constitutional rights of indigent accused, under the Sixth and Fourteenth Amendments, abridged by a reorganization of an independent public defender organization so as to vest 50% control of its board of directors in the executive and prosecuting authorities?

2. May the constitutionally mandated defense of the indigent be entrusted to an agency dominated by law enforcement officials?

3. In passing on the constitutional validity of such an arrangement, is the test whether the arrangement has a manifest and substantial potential for impairing the independence of public defenders, or is it whether actual prejudice can be demonstrated?

Constitutional Provisions Involved

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

This case poses the question of the legality, under the Sixth and Fourteenth Amendments to the federal Constitution, of Philadelphia's newly reorganized system of providing defense counsel to indigent accused. The facts, for the most part recited in the opinions below, are essentially undisputed. Prior to 1969, counsel for the indigent had for 35 years been provided by the Philadelphia Defender Association, a private non-profit association governed by a board of 50 lawyers and leading citizens of diverse backgrounds annually elected by the membership. The income of the association consisted of membership dues and charitable contributions including substantial allocations by the United Fund. Following expansion of the right to counsel

in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and its progeny, it became necessary to enlarge the comparatively small staff of lawyers and auxiliary personnel of the Defender Association. The Ford Foundation provided supplementary support for a limited period, and the City of Philadelphia began to appropriate substantial amounts annually through the budget allocation for the courts. The Defender Association also represents 75% of all federal defendants in the Eastern District of Pennsylvania, having been designated as a "Community Defender Office" under the Criminal Justice Act of 1964, as amended, 18 U.S.C.A. §3006A (1973 Supp.).[1]

In 1968, when it appeared that the budget of the Defender Association would be upwards of $1,000,000, there was introduced in Philadelphia's City Council a bill to replace the independent Defender Association with a Public Defender whose staff would be appointed by the Mayor (Tr. 70-71, 74-76, 78-79).[2] The Defender Association and other organizations representing the black community and the poor opposed the ordinance on the ground that "the Mayor who . . . appoints the Police Commissioner would also be appointing the Public Defender" (Tr. 587, 259). Negotiations ensued between the City administration and the Defender Association, resulting in a "compromise." In exchange for continuing financial support, the Defender Association acceded to the City's demand for the dismissal of the incumbent Chief Defender, whose professional competence was not questioned but who was politically unacceptable to the

[1] See 38th Annual Report of the Defender Association of Philadelphia (1972) p. 1.

[2] "Tr." refers to the transcript of the proceedings in the Court of Common Pleas of Philadelphia.

Mayor (Tr. 253ff, 337ff). The Association dropped its demand that any new Chief Defender should have tenure subject to dismissal for good cause only (Tr. 104ff, 225ff), and agreed to reorganize the Board of Directors so as to share control with the Mayor. The reorganized Board would consist of 30 instead of 50 members. Ten would be designated by the Mayor; ten would be designated by the Defender Association; and these 20 would designate the last ten.

A number of members and directors of the Defender Association, including petitioners, opposed this so-called compromise on the ground that it would create an unconstitutional "partnership" between the independent Association and the executive and prosecuting authorities in City Hall. The Defender Association approved the agreement by a vote of 19 to 16. In accordance with the Pennsylvania Non-Profit Corporation Law, the Association then petitioned the Court of Common Pleas of Philadelphia for approval of the necessary amendment of its charter. Petitioners and others appeared as objectors. In the course of the four-day hearing, there was testimony as to the course of the negotiations referred to above, as to the likelihood of prosecution influence on the defender operation (Tr. 321-2, 367, 473, 609-610); as to the problems of "command influence" in courts martial (Tr. 370ff) and in state-controlled defense as in the Soviet Union (Tr. 526ff); as to the federal constitutional right to independent defense counsel (Tr. 461ff); as to the "appearance of evil" in City control of the defense, undermining the confidence of blacks and other poor defendants (Tr. 398, 412, 525-6, 556); and as to the absence of any legitimate concern of the City that would call for 50% control of the Board of Directors (Tr. 216, 227ff, 240-1, 611).

The trial court, rejecting the federal constitutional arguments advanced in briefs by the objectors and the American Civil Liberties Union and through expert testimony (Tr. 459ff), held that the proposed reorganization of the Defender Association was "lawful", as well as "beneficial" and "not injurious to the community."[3] The Superior Court of Pennsylvania affirmed *per curiam,* two judges dissenting. The Supreme Court of Pennsylvania, with two justices dissenting, affirmed the Superior Court. It held that there is no conflict of interest "in the fact that the Mayor appoints both the Commissioner of Police and the City Solicitor, a prosecuting official, whose interests as law enforcement officers are presumed [by the objectors] to be antithetical to those of criminal defendants," and that the reorganized structure of the Defender Association "provides adequate safeguards to protect its independence." Mr. Justice Roberts, dissenting, reviewed the decisions of the Supreme Court of the United States requiring defense counsel of undivided loyalty, and declared that "the amendments approved by the majority will undoubtedly destroy the necessary independence and non-political character of the Association." The dissenting opinion also emphasized the "equally objectionable appearance of . . . conflict" in the Association's sharing of control with the executive and prosecuting officers of the City, citing *Tumey* v. *Ohio,* 273 U.S. 510, 533 (1927) ("Might not a defendant with reason say that he feared he could not get a fair trial?"). Mr. Justice Roberts' dissent also demonstrated the concrete reality

[3] Conclusions of Law Nos. 3 and 4 of the Adjudication of the Court of Common Pleas dated Aug. 8, 1969. The quoted phrases are the criteria prescribed in the Pennsylvania Non-Profit Corporation Law, 15 Pa. Stat. Ann. §7707 (Purd. 1967), for judicial approval of amendments of charters of non-profit corporations.

of the City authorities' disposition to put pressure on the defender organization, in the following summary taken from footnote 4 of his opinion (App., *infra*, pp. 26a-27a):

> The record also discloses that on June 10, 1969 (at this time, the Defender Association was being primarily privately funded, in substantial part, by the United Fund) the Philadelphia Bulletin reported (on page 1) Police Commissioner (now Mayor) Rizzo's statement that he intended to stop police payroll deductions for the United Fund, since the United Fund also supported the Legal Aid Society. Commissioner Rizzo emphatically stated that organizations that "fight the Police Department . . . won't get a penny." The Philadelphia Bar Association, on June 16, 1969, roundly deplored, by resolution, the Commissioner's threat.[4]

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[4] The Resolution referred to reads as follows:

"WHEREAS, the Philadelphia Commissioner of Police has publicly charged the Legal Aid Society of Philadelphia with harassing ithe police force and processing complaints against police officers, a charge which investigation indicates to be unfounded in fact, and

WHEREAS, the Board of Governors deems such charge an attack upon the freedom of the lawyer to represent his client.

NOW, THEREFORE, BE IT RESOLVED, That the Philadelphia Bar Association through its elected Board of Governors supports and encourages every lawyer in the exercise of his professional responsibility to represent any client or group of clients in regard to any just cause of action no matter how unpopular; and,

FURTHER RESOLVED, That the Philadelphia Bar Association deplores any action or statement by any government official who attempts to discourage or interfere with the operation or activities of a non-profit corporation providing legal services to the community merely because the lawyers employed thereby, acting in good faith and within the confines of ethical conduct, zealously represent their clients in matters deemed embarrassing to, or which involve claims against, a government entity or individuals employed thereby."

The Philadelphia Bulletin on August 27, 1969 (page 42) and on August 29, 1969 (page 1) under the headline "Rizzo Sets Up Meeting With Judge Carroll", reported a meeting, in Mayor Rizzo's office, attended by the District Attorney, the Commissioner of Police, the Mayor and several judges (including President Judge Carroll), at which the judges were pressed to change their "lenient" sentencing policies. (These events, although included in the opponents' brief, are not of record as they transpired after the hearing in the trial court.)

The above events can hardly be viewed by the community and indigent defendants as an assurance that the City will in no way attempt to influence the criminal defense of those unable to retain private counsel.

REASONS FOR GRANTING THE WRIT

I.

This case presents a constitutional issue of exceptional public importance: minimum safeguards of independence of counsel in public defender organizations.

This is the first case to reach the Supreme Court on the subject of the constitutional requirement of independence of tax-supported counsel for the poor. It comes at a moment in history when the institutional forms for defender organizations are in the process of being established for generations to come.[5] If the decision below, accepting the

[5] See Senator Ervin's speech on S. 1461, amending the Criminal Justice Act of 1964 to provide for organized defense of the indigent in federal courts:

> For many years doubts and discomfort accompanied the idea of a government defense function. It was thought that this

"partnership" of law enforcement authorities in the defense of the poor, is allowed to stand, this will not merely permit an isolated case of injustice to go without remedy; it will leave uncorrected a false buoy in the channel of development of defender organizations. There will be many to act on the signal, to grasp the opportunity to politicize the defense of the indigent, to control it so as to give police and prosecutors a freer hand, or merely to dilute the efficacy of the defender organizations by making "spoils system" appointments of third-rate attorneys to the staff. This case evokes no anguishing borderline principle; it calls for an authoritative vindication of the clear constitutional rule that representation by a public defender may not be compromised through organizational links with the prosecuting authorities—may not, in a word, be second class.

The present case is particularly compelling as a vehicle for declaring the constitutional law on the subject because a decision here will be prospective in its operation. That avoids the troublesome problem of wholesale retroactivity which will arise if the structure of public defenders is invalidated through habeas corpus brought by convicts.

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would create a conflict of interest. For some, it would interfere with the Government's main responsibility to prosecute. For others, it was feared the defense function would be subordinate to prosecution-minded Government. After much thought and consideration over the past 6 years, these doubts have been put to rest. The language in S. 1461 which authorizes Government defender offices is specially designed to insure that those who defend an accused will perform the responsibilities no less conscientiously than those who prosecute. The defender organizations are meant to be independent from the Justice Department and, no less important, from the judiciary in all but minor administrative matters.

116 Cong. Rec. 35499 (1970).

II.

The constitutional right to the assistance of counsel is violated by any system of providing defense to the indigent which is dominated by law enforcement authorities.

A. *The Reorganized Defender Association Is So Dominated.*

1. There Is 50% Control *De Jure* and Overwhelming Control *De Facto*.

On its face, 50% of the power in the reorganized Board of Directors is in the hands of the Mayor of Philadelphia, who appoints the Commissioner of Police and the City Solicitor, a prosecuting officer. The Mayor is also, of course, responsible for the maintenance of order in the City,[6] and for the execution of its laws. But the actuality of power is far greater than the nominal 50%. The increment of power above 50% derives from the expectable bloc voting of the Mayor's non-tenured appointees, particularly in the election of the "neutral" directors, on the budget of the Defender, and on any other issue that concerns the Mayor.

The existence of control and the inclination to use it are clear. The Mayor was able to make it a condition of the deal that the incumbent Chief Defender, a political opponent, be dismissed, and that future Chief Defenders should not enjoy a protected tenure but should be dismissable without cause. The bold proclivity of the Philadelphia executive and law enforcement authorities to put pressure on the Defender and even the judges is revealed in the dissenting opinion below. See Statement of the Case, pp. 7-8 above.

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[6] See *Stotland* v. *Pennsylvania*, 214 Pa. Super. 35, 251 A.2d 701 (1969), *app. dism.* 398 U.S. 916, Mr. Justice Douglas dissenting (Philadelphia Mayor's emergency proclamation banning public gatherings).

2. Whatever the Degree of City Hall Control, It Is Excessive If It Is Greater Than Serves Any Legitimate Interest of the City; an "Impermissible Degree of Entanglement" in the Legal Defense of the Indigent Arises.

The unique structure of the reorganized Board of Directors is stamped on its face as an impermissible sharing of power with interests antagonistic to the defense. The tripartite arrangement, under which enforcement authorities designate 10 directors, defense interests designate 10 directors, and these 20 designate 10 more "neutral" directors, is plainly derived from commercial and labor arbitration.[7] Whatever may be the merits of such a structure for an unofficial tribunal on which representatives of each party to a private controversy may, pursuant to prior agreement, sit alongside "neutral" members, it is unthinkable that defense of the indigent be so organized. Legal defense is not arbitration. It is not intended to work out practical compromises or alliances between commercial interests. It is not intended to be "neutral." It calls for unequivocal commitment to the interests of the accused. Even in the military service, where of necessity the ordinary liberties of a citizen are restricted, "command influence" in the structure of courts martial has been abjured.[8] The mere fact

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[7] Cf. *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968).

[8] See Article 37 of the Uniform Code of Military Justice; *United States* v. *Berry*, CM 414955, June 7, 1968, digested in Judge Advocate Legal Service, Pamphlet 27-68-18, page 4 ("Appearance of Command Influence Raises Rebuttable Presumption" of unlawful command influence despite finding of lack of prejudice); *United States* v. *McLaughlin*, digested in JALS Pamphlet 27-69-1, p. 4, Dec. 13 (1968) (routine command memo assigning three out of a panel of 12 duly assigned officers, for purposes of allocating trial duties, held unlawful command influence); Hansen, *Judicial Functions for the Commander?* 41 Mil. L. Rev. 1 (1968). Cf. *O'Callaghan* v. *Parker*, 395 U.S. 258, 263 (1969).

that government funds are appropriated does not legitimate every restriction the government might seek to impose on the grantee. In the field of welfare legislation, for example, payments to the poor cannot, consistently with constitutional guarantees of liberty, be accompanied by official intrusions on privacy or burdensome constraints.[9]

The only legitimate official interest in the conduct of publicly financed defense is that the funds be honestly and efficiently employed. Not one witness suggested that protection of that interest required the power position that City Hall successfully demanded here. The independent Defender Association had for more than 30 years been conducted "in a gold fish bowl" with a standing invitation to interested public officials to attend directors' meetings. Audits had been carried out in connection with grants from the City and the United Fund. In these circumstances, it was incumbent on the courts below to insist that City Hall power over the defense be circumscribed, to be sure that the principle of "the least restrictive alternative" be applied.[10] The City of New York, which wholly finances defense of the indigent, has no "representatives" on the directorate of the Legal Aid Society (Tr. 501).

In any event, the partnership of law enforcement and defense, sanctioned by the court below, involves an "imper-

[9] Cf. *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969) (invalidating one year residence requirement for welfare recipients as unreasonable restriction on movement); *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (disqualification of Seventh Day Adventist for unemployment benefits because of refusal to accept work on Saturday infringes First and Fourteenth Amendments). See generally Note, *Another Look At Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1969).

[10] Cf. Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).

missible degree of entanglement" by officialdom with the lawyer-client relationships of the poor.[11]

B. *The Sixth and Fourteenth Amendments to the Federal Constitution Forbid "Partnership" Between Prosecuting Authorities and Counsel for the Indigent Accused.*

1. Such a Partnership Violates the Due Process Clause of the Fourteenth Amendment.

The constitutional right of poor people to independent, fully effective counsel through every critical stage of any substantial criminal prosecution is today unchallenged.[12] The right "to enjoy the assistance of counsel" has been incorporated into the Fourteenth Amendment as an obligation upon the States, and it has been interpreted to require the state not only to permit counsel but to provide counsel otherwise unavailable to the accused. The reasons why the right to counsel has been generously construed and firmly woven into the fabric of our national life are worth examining since they expose the constitutional deficiency of Philadelphia's proffer of legal assistance.

In the first place the right to counsel rests on the idea of fundamental fairness implicit in the phrase "due process of law." Enormous resources are, in modern society, allocated to a professional police force and professional prosecutors. It would be grossly unfair to the poor and ignorant to leave them to their own resources in confronting the

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[11] Cf. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

[12] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *In re Gault*, 387 U.S. 1 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Coleman* v. *Alabama*, 399 U.S. 1 (1970); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). Cf. *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Leviathan state.[13] Moreover—and this is the core of the lesson of *Gideon* and its progeny—this inequality cannot be remedied by offering partial substitutes. It was well understood before *Gideon,* that a prosecutor was under a special professional obligation not to overreach an uncounseled defendant, and that the judge was under a special obligation to protect the interests of such a defendant. In *Anders* v. *California,* 386 U.S. 738 (1967), where appointed defense counsel filed a "no merit" letter and withdrew from his client's appeal, this Court insisted upon advocacy fully committed to the client, notwithstanding that there was no suggestion of incompetence or bad faith, and notwithstanding that the California judges had laid upon themselves the duty to review the transcript and independently confirm that counsel's "no merit" letter was correct. Cf. *Douglas* v. *California,* 372 U.S. 353 (1963) (counsel on appeal required despite judicial determination that it would not be "helpful"). Thus neither the assumed professional reliability of lawyers nor the obligation of judges to prevent prejudice arising from lawyers' shortcomings saves a conviction where counsel was not unequivocally the advocate for his client.

In holding inadequate these substitutes for a lawyer unequivocally dedicated to the defense, this Court was simply responding to realities: the judge and the prosecutor, bound by other and conflicting obligations to the community, cannot give the defendant what he is entitled to expect from his own lawyer—for the reason, if no other, that the accused could not possibly confide in these representatives of the community which seeks to punish him. The reasoning is entirely applicable to the present case,

[13] *Johnson* v. *Zerbst,* 304 U.S. 458, 462-3 (1938).

where the Philadelphia plan puts the indigent accused into the hands of a "partnership" comprising law enforcement authorities and independent directors.

As Mr. Chief Justice Burger pointed out in his concurring opinion in *Argersinger* v. *Hamlin*, 407 U.S. 25, 44 (1972), "The right to counsel has historically been an evolving concept . . . Part of this evolution has been expressed in the policy prescriptions of the legal profession itself. . . ." It is therefore appropriate to consider, as was done in *Argersinger*, the American Bar Association's Standards Relating to Providing Defense Services (1968). Standard 1.4 is entitled "Professional Independence," and provides, in part:

> The plan should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence. . . .

Standard 3.1 deals with "Career Service," and provides, in part:

> Selection of the chief defender and staff should be made on the basis of merit and should be free from political, racial, religious, ethnic and other considerations extraneous to professional competence. The tenure of the defender and his staff should be protected similarly.

The Handbook on How to Organize a Defender Office (1967) of the National Legal Aid and Defender Association calls for a governing board which "provides a screen between the defender and 'City Hall' ", appointment of the defender by "an independent board" rather than elected

officials, and tenure for the defender subject to removal only for good cause. Handbook, p. 31.

The least that would be required of a prosecution-linked defender organization, from the point of view of professional ethics and constitutional law, would be full disclosure to each client of the conflict of interest in City Hall's partnership in the Defender Association. This is clear even in civil cases. The American Bar Association's Code of Professional Responsibility (Special Committee on Evaluation of Ethical Standards, 1969), speaking of "potentially differing interests" of multiple clients (Paras. EC 5-14 et seq.), warns against "diluted" or "divided" loyalty, states that "all doubts" should be resolved against representation of potentially conflicting interests, and insists upon the client's being given *"opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires"* (EC 5-16). The lawyer is required to explain the "implications" of common representation before securing his client's consent, and to advise the client of "other circumstances" that might cause the client "to question the undivided loyalty of the lawyer." "Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client" (EC 5-19).

Speaking of the effect on lawyers' independence of "desires of third persons" (EC 5-21 et seq.), the Committee says:

> A lawyer subjected to outside pressures ["often subtle, and a lawyer must be alert to their existence"] should make full disclosure of them to his client.

The Committee notes the special liability to political, economic, and social pressures of the lawyer who is being paid by someone other than his client. What is so emphasized in civil cases must *a fortiori* be true in criminal defense, where effective assistance of counsel is a fundamental constitutional right.

It is obviously unwise and impractical to operate a defender organization on the basis of disclosures to and waiver by often ignorant prisoners with no effective alternatives (Tr. 491-3). It would take far too much time; the process would degenerate into an ineffectual formality of giving prisoners written explanations and waiver forms; much suspicion would be generated by the very process of seeking to allay it; and numerous convictions would be opened to collateral attack.

2. Equal Protection of the Laws Is Denied Where Defense Counsel for the Poor Is Subject to Control by Prosecuting Authorities.

A second basis of the right-to-counsel cases is the Fourteenth Amendment's concern for the "equal protection of the laws." Here, the point is not equalization of legal skills on both sides of the adversary process, but rather a decent attempt to equalize the situation of the rich and the poor before the law.[14] Our society finds it unacceptable that legal procedures themselves should favor the rich, that wealth can assure itself exceptional safeguards in the operation of the law. Such a special safeguard would exist if defense lawyers were available only to those who could afford them. Such a special safeguard would exist if the rich could hire lawyers unequivocally independent and

[14] *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963).

zealous while the poor were obliged to accept lawyers in a partnership dominated by law enforcement authorities. There are obvious practical limits to equalization of legal skills so long as the rich can engage "the best" lawyers and back them up with hired accountants, psychiatrists, and other experts. But surely the constitution forbids the officially institutionalized inequality involved in a public defender organization that gives the law enforcement authorities a large share of control over defense policies and personnel.

3. Actual Prejudice Need Not Be Shown Where Defense Counsel's Independence Is Impugned. It Is the Possibility Not the Actuality of Prejudice That Is Determinative.

A third reason why this Court came to declare an absolute constitutional right to counsel, in place of the old practice of reversing convictions of the undefended only upon a showing that lack of counsel "prejudiced" the defendant, was the practical impossibility of knowing whether there had been such prejudice.[15] Professional ethics or the possibility of reversal of conviction might restrain a prosecutor from overreaching an uncounseled defendant in any way that would be reflected in the transcript. The judge's solicitude might save an uncounseled defendant from obviously hurting his own interests. But such constraints are totally ineffective to prevent the most grievous prejudice of all: failure of the defense to prepare the case effectively, to assure the presence of witnesses whose value to the accused might not even be apparent to him, to investigate the legality of searches and seizures or the possibility of

[15] See Tr. 464 et seq.; Mr. Justice Black, dissenting, in *Betts* v. *Brady*, 316 U.S. 455, 476 (1942); Beaney, The Right to Counsel in American Courts, 163, 185, 234-235 (1955).

illegal wire-tapping, to explore the possibility of negotiating with the prosecution for a plea to a lesser offense. It is precisely this potential for hidden prejudice that is most striking in the Defender Association "partnership" with law enforcement authorities. The Mayor of Philadelphia is the chief executive, responsible for execution of law in the city, for maintaining order in the community, for the appointment and policies of the Police Commissioner and the City Solicitor, for the conduct of the city's fiscal affairs.

The leading Supreme Court case on the necessity for undivided loyalty of counsel to his accused client without inquiry into actual prejudice, is *Glasser* v. *United States,* 315 U.S. 60 (1942). There the Supreme Court reversed a conspiracy conviction on the ground that the trial judge had appointed defendant's lawyer to represent also a co-defendant where there was a potential conflict of interest between the two clients. Conviction was reversed notwithstanding substantial basis for finding that defendant (a former assistant U.S. Attorney) and his lawyer had waived objections to the appointment. The Court's opinion declared (at pages 75-76):

> "To determine the precise degree of prejudice sustained by Glasser . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Cf. *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927) ("every procedure which would offer a possible temptation to the average man"); *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 393 U.S. 145 (1968) (required disclosure by arbitrator of any business dealings "that might

create an impression of possible bias"); *Lemon* v. *Kurtzman,* 403 U.S. 602, 619 ("potential" for impermissible fostering of religion bars state subsidy even on assumption that teachers would successfully segregate religious and secular responsibilities).

The unequivocal loyalty of defense counsel is at least as important as the impartiality [and immaculate appearance thereof] of the judicial officers involved in the *Tumey* and *Commonwealth Coatings* cases. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), the landmark case establishing that lack of counsel renders a conviction subject to collateral attack, treated absence of counsel as "failure to complete the court" resulting in loss of jurisdiction. An accused needs a lawyer whom he can trust absolutely even more than he needs a completely impartial judge. Confidentiality is a feature of the client-attorney relationship; it is not so of the judge-defendant relationship. The zealous defense lawyer can often manage to avoid subjecting his client to trial before an unsympathetic judge, be watchful against expressions of bias from the bench, and seek remedies by appeal.

The court below erred in conceiving the issue to be whether "a potential 50% degree of control . . . by the City serve[s] automatically to deprive the indigent client of competent, disinterested counsel" and whether the Defender Association would "be able to render" adequate service. The protestants have never contended that the City-Hall-Public-Defender partnership "automatically" deprives clients of zealous, independent counsel in every case or renders such an organization incapable in every case of supplying satisfactory legal services. A defender organization wholly subject to the Mayor, the Chief of Police, or the district attorney might, if the particular incumbent

officials were extremely high-minded, furnish exemplary legal services. So also it is conceivable that, under a system where judges were designated by and held office at the pleasure of a committee dominated by law enforcement officials, some brave and unbiased judges might nevertheless be found on the bench. Even if the dominating political and prosecutorial group were determined to subvert the defense of poor accused, there would always be individual attorneys on the staff of the Defender who might defy the pressures upon them and honor their professional oaths of loyalty to the client. But what client would be sure? And by what constitutional right do we impose upon poor defendants a lawyer whose unqualified zeal under political pressure must be accepted on blind faith, when a person with means would never take such a risk?

The question at issue is not whether the reorganized Defender Association might be *able* to render acceptable disinterested service in some cases—perhaps the "routine" cases and perhaps so long as community vigilance is maintained[16]—but whether it is so organized as to minimize or eliminate doubts on this score by the clients and the community, i.e. to assure confidence in the integrity of the administration of justice. There was testimony in the record that even the old independent Defender Association was not entirely trusted by its client population, who may have sensed inevitable subtle links between such an "establishment" organization and the political powers that be (Tr. 398, 412, 525-6, 556). Cf. Mr. Justice (then Judge) Burger, in Proceedings of the National Defender Conference (1969) at p. 45:

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[16] Cf. the trial court's reliance on community "watch dogs" to keep the reorganized Defender Association free of "undue" political influence. Finding 20.

> "... [T]he court appointed counsel is, in effect, thrust upon a defendant who has nothing to say about his selection; therefore the tendency, as we know, is for many—perhaps most—defendants to regard this public defender as a part of the establishment which is arrayed against him."

So concerned was the old Defender Association about client suspicion of divided loyalty that it declined an offer of free office space in City Hall, and maintained its separate quarters in a private office building (Tr. 243-4). The effect upon client morale of an overt submission of the organization to 50% domination by the law enforcement group needs no imagination.

4. Constitutionally Mandated Defense Services Must Provide the Appearance as Well as the Reality of Independence.

An important function of providing defense counsel is to build confidence in the fairness of the judicial process. It is not merely that the outcome of a particular case may be skewed where there is a lawyer on one side and none on the other. It is that underprivileged groups in the community come to view courts and law with cynicism and hatred when trials seem one-sided, as where there is no defense counsel or an "official" defense counsel. *All* convictions become tainted in their eyes, even though the outcome of many individual cases would be found on close examination to be perfectly just.

The importance of avoiding the "appearance of evil" in the processes of justice is attested by cases like *Commonweath Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968); *Tumey* v. *Ohio*, 273 U.S. 510 (1927); and *Rapp* v. *Van Dusen*, 350 F.2d 806, 812 (3rd Cir. 1965) ("not only

actual impartiality [of a judge], but also the *appearance* of a detached impartiality").

5. The Court Below Explicitly and Erroneously Held That There Is No Conflict of Interest Between Prosecuting Authorities and the Accused.

At the heart of the holding of the Pennsylvania Supreme Court is the denial that "interests [of the Commissioner of Police and the City Solicitor, a prosecuting official, both appointed by the Mayor] are . . . antithetical to those of criminal defendants." App., *infra*, p. 8a. The proposition that prosecutor and criminal defendant have parallel or common interests is not only a palpable fiction; it is an extremely dangerous one. It is a theory appropriate to an authoritarian state like Russia.[17] On this theory of the congruence of interests of prosecutor and defendant, the Big Brother view of government, the Philadelphia plan here at issue could without constitutional obstacle provide for direct administration of the Defender Association by the District Attorney or the Police Commissioner himself. See also Mr. Chief Justice Burger's dissenting opinion (joined by Mr. Justice Rehnquist) in *Application of Fre Le Poole Griffiths for Admission to the Bar*, 93 S. Ct. 2581, 2560 (1973):

> "In some countries the legal system is so structured that all lawyers are literally agents of government and as such bound to place the interests of government over those of the client. That concept is so alien to our system with an independent bar that I find it difficult to

[17] The system of defense by state appointees in the U.S.S.R. was described by the witness, Sawyer (Tr. 526 et seq.). Compare the concerns expressed by a distinguished federal judge in Dimock, *The Public Defender: A Step Toward a Police State*, 42 A.B.A.J. 219 (1956).

see how nationals of such a country, inculcated with those ideas and at the same time unwilling to accept American citizenship, could be properly integrated to our system."

Listed below are subjects of obvious conflict of interest, as to which those who speak for the Mayor on the Board of Directors, as well as the non-tenured Chief Defender, will inevitably be responsive to the Mayor's inclinations:[18]

(i) limiting the Defender's staff in the face of constantly increasing case loads;

(ii) economizing on pre-trial preparation;

(iii) muting attacks upon the lawfulness of police practices;

(iv) limiting demands for expensive jury trials;

(v) limiting resort to defenses normally availed of by independent counsel to enhance the defense bargaining postion in plea negotiations;

(vi) a conservative policy in seeking review by appeal and collateral attack;

(vii) restraining challenges to the constitutionality of administration measures such as curfew ordinances and executive proclamations barring public assemblies;

(viii) restraining challenges by habeas corpus of inhuman conditions in the detention facilities, where improvement would involve expenditure of millions;

(ix) limiting the Defender's role as legislative advocate in criminal law, procedure, and corrections.

[18] Cf. Tr. 493 et seq.

Prosecution influence on these subjects will not be recorded in resolutions passed by the Board of Directors or instructions formally issued by the Mayor. Rather they will manifest themselves in a quiet word of counsel passed along to the non-tenured Chief Defender by the City Solicitor who sits on the Defender Board. Or in a complaint by the Police Commissioner to the Mayor that the defender attorneys are overly aggressive in challenging policemen's testimony in court—a complaint that the Mayor's administrative assistant quietly "bucks on" to the Defender.

Herman Pollock, former Chief Defender, a principal negotiator of the "partnership" arrangement, testified as follows at Tr. 592:

> . . . whether or not this organization continues as an independent organization is not going to depend on the City; it's going to depend on our own Board that's there now. *If they will continue to fight* to keep the Association independent, it will be independent, but if they're going to compromise all over the place then it may be our effectiveness may be diminished. No doubt about that.
>
> *If they can muster the necessary community support,* in my opinion, should the occasion arise when it is needed to protect the independence of the Defender and the staff, I think there will be no trouble in Philadelphia of doing it (emphasis supplied).

This is an outright admission that the situation was one fraught with peril of political interference against which the independent directors and other community agencies must "*continue to fight.*" It is a complete refutation of the holding by the Court below that there is no conflict of interest between the accused and his prosecutors. What City

Hall's attitude will be towards an aggressive defender operation is perfectly summed up in the public declaration by Philadelphia Police Commissioner (now Mayor) Rizzo that organizations that "fight the Police Department . . . won't get a penny." [19]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Pennsylvania.

Respectfully submitted,

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September 1973

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[19] See footnote 4 in the dissenting opinion of Justice Roberts, pp. 7-8 above.

Judgment and Opinion of the Supreme Court of Pennsylvania

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 102—January Term, 1972

Appeal from Order of the Superior Court, October Term, 1970, No. 989, Affirming Adjudication of the Court of Common Pleas of Philadelphia County, Trial Division, June Term, 1930, No. 1005.

IN THE MATTER OF AMENDMENTS TO THE ARTICLES OF INCORPORATION OF THE DEFENDER ASSOCIATION OF PHILADELPHIA

Appeals of Bernard L. Segal and Louis B. Schwartz

OPINION OF THE COURT

FILED: July 2, 1973

POMEROY, J.

We are presented by this appeal with the question whether the work of the Defender Association of Philadelphia in affording legal representation to indigent persons accused of crime will be compromised and rendered constitutionally ineffective by reason of the substantial representation of the City of Philadelphia in the management of the Association. Specifically, does a potential 50% de-

gree of control of the governing board of the Association by the City serve automatically to deprive the indigent client of competent, disinterested counsel.

The Defender Association, a nonprofit corporation in existence since 1934, applied to the court below in 1969 for approval of certain amendments to its Articles of Incorporation. The Non-Profit Corporation Law[1] provides that the court of common pleas shall approve amendments to the charter of such corporations if in the court's opinion they are "lawful, will be beneficial and not injurious to the community." Objections interposed by appellants and others were heard and considered, whereupon the court of common pleas entered its order approving the amendments.[2] On appeal the Superior Court affirmed, per curiam, without opinion, two judges dissenting.[3] *Defender Association of Philadelphia Amendment of Articles of Incorporation,* 219 Pa. Super. Ct. 309, 279 A.2d 303 (1971). We granted allocatur because of the importance of the question involved, and now affirm.[4]

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[1] Act of April 29, 1874, P.L. 73, § 42, as amended, 15 P.S. § 7707.

[2] Appellants Segal and Schwartz are both members of the appellee Association who voiced their opposition to the proposed amendments at the appropriate meetings of the Association. Mr. Schwartz had been also a director of the Association, but resigned from that position because of the matters here in controversy. In the hearings below the appellants represented themselves and certain other objectors to the proposed amendments.

[3] Judge Spaulding filed a dissenting opinion in which Judge Hoffman joined.

[4] Appellate scope of review in an appeal from an order approving articles of amendment of a nonprofit corporation is properly limited to whether or not the lower court committed an error of law or a serious abuse of discretion. See *Nottingham Fire Co. Charter Case,* 394 Pa. 631, 632, 149 A.2d 119 (1959); *In re Elkland Leather Workers' Association, Inc.,* 330 Pa. 78, 198 A. 13 (1938).

The facts as found by Judge McDevitt in his adjudication are not disputed. They may be summarized as follows: From the time of its incorporation in 1934 until the mid-nineteen sixties, the Association had been purely private in character, deriving its funds from membership dues and contributions from individuals and charitable organizations such as the Community Chest and the United Fund. Until the revolution in the field of constitutional law relating to criminal procedure which began in the early part of the last decade, the Association could function adequately with the moneys so received. Commencing with the historic decision of the Supreme Court of the United States in *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L.Ed.2d 799 (1963), however, the scope of judicially mandated representation of the poor increased dramatically.[5] The Association there-

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[5] Other decisions of the Supreme Court extending the rights to counsel include *Argersinger* v. *Hamlin,* —— U.S. ——, 32 L.Ed. 2d 530 (1972) (extending the Sixth Amendment right to counsel to defendants in any criminal case where imprisonment for any term could be imposed); *Coleman* v. *Alabama,* 399 U.S. 1, 26 L.Ed. 2d 387 (1970) (defendants entitled to counsel at preliminary hearings); *Mempa* v. *Rhay,* 389 U.S. 128, 19 L.Ed.2d 336 (1969) (holding revocation of probation and imposition of sentence to be a critical stage requiring assistance of counsel); *In re Gault,* 387 U.S. 1, 18 L.Ed.2d 527 (1967) (juveniles in delinquency proceedings held constitutionally entitled to representation of counsel); *Douglas* v. *California,* 372 U.S. 353, 9 L.Ed.2d 811 (1963) (counsel must be provided for any indigent defendant on the first appeal from a conviction allowed as a matter of right). Cf. *United States* v. *Wade,* 388 U.S. 218, 18 L.Ed.2d 1149 (1967); *Gilbert* v. *California,* 388 U.S. 263, 18 L.Ed.2d 1178 (1967); *Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed.2d 694 (1966); *Escobedo* v. *Illinois,* 378 U.S. 478, 12 L.Ed.2d 977 (1964).

Our own Court has been diligent to protect the right to counsel at various stages of the criminal process. See, e.g., *Commonwealth ex rel. Rambeau* v. *Rundle,* —— Pa. ——, —— A.2d —— (March 9, 1973); *Commonwealth* v. *Sheehan,* 446 Pa. 35, 285 A.2d 465 (1971); *Commonwealth* v. *Tinson,* 433 Pa. 328, 249 A.2d 549 (1969); *Commonwealth ex rel. Firmstone* v. *Myers,* 431 Pa. 628, 246 A.2d 371 (1968); *Commonwealth* v. *Sliva,* 415 Pa. 537, 204

fore sought other sources of funding in order to continue to provide quality defense services to the increasing number of indigents entitled to them. Initially the Association was successful in obtaining significant financial assistance through grants from the Ford Foundation, the National Defender Project of the National Legal Aid and Defender Association, the United States Office of Economic Opportunity (OEO) and voluntary contributions of the City of Philadelphia. Thus, by 1967, the combined budget for Association operations, including representation of juveniles, had risen to $600,000; of this amount $152,000 came from the City.

In 1968 the still increasing need for legal defense services and the termination of contributions previously received for limited time periods from the Ford Foundation, OEO and the National Defender Project combined to create a financial crisis for the Association. An effort to obtain additional funds from the City was unsuccessful, and the Association was compelled to plan for a reduction of services. Contemporaneously, in November of 1968, a bill was introduced in City Council proposing the creation of a wholly new public defender program unrelated to that of the Association, the chief administrative officer of which would be appointed by the Mayor of the City of Philadelphia. The bill met immediate opposition from the Association and from many other groups in the community who were satisfied that throughout its existence the Association had provided indigent citizens with independent legal de-

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A.2d 455 (1964); *Commonwealth ex rel. Remeriez* v. *Maroney*, 415 Pa. 534, 204 A.2d 450 (1964); *Commonwealth ex rel. O'Lock* v. *Rundle*, 415 Pa. 515, 204 A.2d 439 (1964). A review of federal and state decisions following *Gideon* is contained in Comment, Right to Counsel; Impact of *Gideon* v. *Wainwright* in the Fifty States, 3 Creighton L. Rev. 103 (1970).

fense services of the highest quality. There followed meetings between representatives of the Association and the City to search for a compromise approach which would enable the Association to continue to provide all of the constitutionally required legal defense services in Philadelphia. These negotiations resulted in a contract between the Association and the City, entered into on January 28, 1969.

The contract was approved by a majority (19 to 16) of the Board of Directors of the Association. It provides that the Association shall provide counsel and necessary investigative and other services to indigents in various areas of representation,[6] and that the City shall compensate the Association in amounts to be appropriated by City Council from time to time.[7] The Board of Directors of the Association is to be reduced in number from 50 to 30 members, 10 directors to be chosen by the Mayor of the City of Philadelphia with the approval of City Council, ten to be chosen by the members of the Association, and the remaining ten directors (called "community directors") to be chosen by agreement among a majority of the City directors

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[6] The contract identified the following types of proceedings wherein the Association's services would be supplied:

(1) Juvenile delinquency;
(2) Any indictable offense at any stage of the prosecution;
(3) Any offense cognizable before the Municipal Court;
(4) Post conviction proceedings;
(5) Habeas corpus proceedings;
(6) Extradition proceedings;
(7) Probation and parole proceedings; and
(8) Appeals.

[7] For the fiscal year 1969-70 the Association budgeted $1,263,595 to provide the representation called for by the contract, of which amount it was agreed that the City would provide $1,160,095 (about 92% of the budget).

and a majority of the Association directors. Under the contract the Board of Directors appoints the Chief Defender and the First Assistant Defender; the Chief Defender appoints such other professional and non-professional staff as may be necessary.[8]

As a result of the agreement between the City and the Association, the public defender bill then pending in City Council was not acted upon. It was to effectuate the contractual provisions pertaining to changes in its organizational structure that the Association undertook to amend its Articles of Incorporation, for that purpose seeking the necessary approval of the court of common pleas.

There is no dispute that any plan to provide counsel to persons who need representation in criminal proceedings should be designed to provide counsel who is both competent and independent. "The plan and the lawyers serving under it should be free from political interference."

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[8] The agreement also contains the following additional provisions:

(1) The Chief Defender shall be a lawyer in active practice before the courts of record of the County of Philadelphia with at least five (5) years' experience in the active practice of law.

(2) All employees shall be full-time except with the approval of two-thirds of all members of the Board.

(3) The term of the contract shall be perpetual; provided, however, that either party may terminate it on June 30th of any calendar year provided not less than ninety days written notice of such termination is given. In addition, the Association is authorized to terminate the agreement upon thirty days written notice "[i]n the event that the Association shall determine that any such appropriation by the City [to compensate the Association for its services under the agreement] is insufficient."

(4) The City shall have the right to audit the books and records of the Association. For this purpose such books and records shall be made available to representatives of the Finance Director of the City and the City Controller at such reasonable times as are required by any such representative.

A.B.A. Project on Providing Defense Services § 1.4, at 19 (Approved Draft, 1968). The integrity of the relationship between lawyer and client, requiring among other things complete fidelity to the client's interest, should be preserved inviolate. Like any lawyer, a person chosen to represent an accused indigent person may serve but one master—the client. Independence of any plan to provide such services can be assured "if and only if the system is properly insulated from pressures, whether they flow from an excess of benevolence or from less noble motivations." *Id.* § 1.4, at 20 (Comment).[9] The question presented by the case before us is whether the Association, as it will be reorganized pursuant to the contract with the City, will be able to render defender services which measure up to these standards. We hold that the court of common pleas committed no error of law or abuse of discretion in finding that on this record the question should be answered affirmatively.

In essence, appellants' objections to the amendments are that the appointment of one-third of the Association's directors by the Mayor ("City directors") and the selection by those directors and the "Association directors" of the final one-third of the Board ("community directors") in effect gives the City 50% representation and thus potentially effective control of the Association. This in turn, it is said, will adversely affect the independence of Association attorneys and thus create an unconstitutional conflict of interest. It therefore follows, so appellants argue, that the amendments are neither "lawful, beneficial or non-

[9] See also Equal Justice for the Accused 61, 71, 74-76 (Report of a Special Committee of the Association of the Bar of the City of New York and The National Legal Aid and Defender Association, 1959).

injurious to the community" as required by statute. The conflict of interest is found in the fact that the Mayor appoints both the Commissioner of Police and the City Solicitor, a prosecuting official,[10] whose interests as law enforcement officers are presumed to be antithetical to those of criminal defendants. We are unable to agree.

We are of course well aware of the line of conflict of interest cases to which appellants refer us and which declare that "the potentiality that [actual] harm *may* result, rather than that such harm *did* result will require reversal." *Commonwealth* v. *Werner*, 217 Pa. Super. Ct. 49, 268 A.2d 176 A.2d 641 (1962) (emphasis in original). See also *Commonwealth* v. *Wilson*, 429 Pa. 458, 240 A.2d 498 (1968); *Commonwealth* v. *Werner*, 217 Pa. Super. Ct. 49, 208 A.2d 195 (1970); *Commonwealth* v. *Bostick*, 215 Pa. Super. Ct. 488, 258 A.2d 879 (1969). These and other similar cases invariably involve direct conflicts that arose in situations in which defense counsel undertook to represent co-defendants with differing interests.[11] In the case before us, however, the potentiality of conflict of interest is not direct, but is attenuated and speculative at best, as examination of the proposed new organizational structure shows.

The Mayor appoints one-third of the members of the Association's Board of Directors. Even should each of these City directors be obliged to follow, for political or other reasons, the dictates of the Mayor in exercising his

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[10] The City Solicitor acts as a prosecutor in cases involving violations of some criminal ordinances (e.g., anti-weapon ordinances) and also in cases of violation of mayoralty proclamations.

[11] See A.B.A. Special Committee on Evaluation of Ethical Standards, Code of Professional Responsibility, Disciplinary Rules 5-105, 5-107(A), (B) (Final Draft, 1969); A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Defense Function § 3.5(b) (Tent. Draft, 1970).

or her vote as a member of the Board, this would not give the Mayor or the City control of the Association.[12] It is appellants' theory, however, that the manner of selecting the community directors envisaged by the charter amendments, viz., by agreement of a majority of the City and Association directors, would effectively raise city representation to 50%. This argument assumes, of course, that the City group and the Association group each will select one-half of the community directors and that each group will automatically accept the nominations of the other. It also assumes that those community directors will themselves be the creatures of the group which nominated them. All this is sheer speculation. We have no reason to believe that the Association directors, at least one of whose votes is necessary for majority action, would be unaware of the obvious harm that would result from the injection of improper influence into the operation of the Association and would accept nominees for community director seats on the board if there were any indication that such nominees would act merely as a rubber stamp for the Mayor. We think it much more likely that both the Association directors and the City directors would make and approve nominations of persons whose character, background and experience suggest qualification for the task of board membership independent of any political predilections.

Appellants argue that, in the same way that effective control of a business corporation can be had with ownership of less than 50% of the outstanding shares,[13] so here

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[12] While appellants assume that the City directors would act in concert on all matters, there is no evidence whatever in the record that this would necessarily be so.

[13] See generally L. Loss, Securities Regulation 770 (2d ed. 1961); Berle, "Control" in Corporate Law, 58 Col. L. Rev. 1212 (1958).

it would be possible for the City to control the Association even though the City could dictate the votes of something less than 50% of the Board of Directors. The analogy is inapposite here where we are not dealing with a business corporation controlled through stock ownership. The arithmetic of control involved in the present case is simple indeed. In making a decision on behalf of the Association, thirty votes may be cast by the Board of Directors; each member of the Board has one vote; the ten votes of the City directors, assuming they would vote in a bloc, would obviously not constitute a majority and would not constitute control of the Association.[14]

Furthermore, the Bylaws of the Association contain safeguards against the creation of an impermissible conflict of interest. The Board of Directors must select the Chief Defender and the First Assistant Defender *by majority vote.*[15] The Chief Defender, in turn, has the power to ap-

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[14] Cf. *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, 95, 96 (1912), wherein the Court recognizes that although a large corporation with many shareholders can effectively be controlled through united ownership of less than 50% of the stock, a small corporation cannot normally be controlled through ownership of less than a majority of outstanding stock. See also H. Oleck, Non-Profit Corporations, Organizations, and Associations (2d ed. 1965) ("In a non-profit corporation [a control] agreement is rather futile . . . since each member ordinarily has only one vote, an agreement of this kind would have no real effectiveness unless it included a majority of the members." See generally, Hornstein, Stockholders' Agreements in The Closely Held Corporation, 59 Yale L.J. 1040 (1950); F. H. O'Neal, Close Corporations (1970).

[15] Judge McDevitt, in his thorough and careful adjudication, stated that it was his belief that the Chief Defender and his assistants should have the protection of 'tenure' in office . . . Anything less will be a clear indication that the defender organization is suspect. The Association must offer lawyers career service opportunity." We agree. Later in his discussion, the hearing judge observed that "[f]or the first time the Association will be in a position to offer prospective members of the defender staff a competitive and adequate salary or rate of compensation and hopefully a career."

point the Association's professional, investigative, and clerical staff. Unless two-thirds of the Board approve, every Association employee must be full-time.[16] No employee of the Association is permitted to be a candidate for public office, a member of any committee of a political party, a member of a committee of a partisan political club, or to take part in the management or affairs of any political party or any political campaign.

In sum, then, the assumed attitude of antagonism to criminal defendants which lies at the base of the conflict of interest charge must be transmitted from the Mayor and City Council to a majority of the Association's Board of Directors, and thence from the Board to the Chief Defender. According to appellants' scenario, the Chief Defender, acting for or under the influence of the Mayor and the Board, would make decisions and influence staff attorneys to violate the standards of professional conduct by acting in a manner contrary to the best interests of their client. As the court of common pleas found, the record is devoid of any concrete facts to support this hypothesis.

In contrast, there is ample evidence in the record to sustain the lower court's conclusion that the Defender's office under the new structure will not be infected *ab initio* with a built-in conflict of interest.[17] It was found as a fact

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[16] The "full-time" employment requirement for Association staff is an obvious recognition of the necessity for employee independence. The City's acceptance of this arrangement would seem to be an indication of its good faith.

[17] We note in passing that the record reveals that the amended articles of incorporation met with the approval of both the United Fund of Philadelphia, a large contributor to the Association, and the Board of Governors of the Philadelphia Bar Association. Each organization indicated that it is believed that the amendments would be beneficial and would not adversely affect the independence of the Association.

that in recent years a number of public defender systems have been established in which management was placed in a board of directors containing, as here, substantial representation from both the public and private sector.[18] Such "public-private" defender systems have been able to maintain their independence. Within the classification of public defender systems are also included several other organizational forms. Among these are the assigned counsel system,[19] where generally counsel is appointed by the courts, a strictly public program headed by a public official and supported by public funds,[20] and private defenders who are financed only by private donations. We recognize that a conflict of interest may conceivably arise in any of these programs. It is impossible to insure in advance against all forms of influence which might bear adversely on the quality and the independence of the defender services.

We believe that the lower court did not abuse its discretion in holding that the organizational structure of the Philadelphia Association provides adequate safeguards to protect its independence. By today's affirmance we do not suggest that this structure thus approved is necessarily the form of organization that will best withstand improper pressure; we hold merely that there is sufficient evidence

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[18] See generally Equal Justice for the Accused (Report of a Special Committee of the Association of the Bar of the City of New York and The National Legal Aid and Defender Association, 1959); A.B.A. Project on Standards for Criminal Justice, Standards Relating to Providing Defense Services (Approved Draft, 1968); Silverstein, Defense of the Poor in Criminal Cases in American State Courts (1965); National Defender Project, Handbook; How to Organize a Defender Office (1967).

[19] See, e.g., Alaska Rules Crim. Prac. 39; Ky. Rev. Stat. Ann. §453.190 (1963); W. Va. Code—62-3-1(a) (1966).

[20] See, e.g., Conn. Gen. Stat. Ann. §§50-81a, 54-80 (Supp. 1965); Minn. Stat. Ann. §611.12 (1964).

in the record to sustain the lower court's finding that the articles of incorporation, as amended, comport with the requirements of the Non-Profit Corporation Law.[21]

Order affirmed.

MR. JUSTICE ROBERTS filed a dissenting opinion in which MR. JUSTICE MANDERINO joins.

[21] Our holding in no way precludes the possibility of judicial relief in future if the occasion should arise. As only one example, should it appear that pressure has been brought to bear on Association attorneys to persuade their clients to forego jury trials or appeals in order to avoid the cost to the City that they entail, a clear case of unconstitutional conflict of interest would be made out, not to speak of violations of the standards of professional responsibility. Evidence of improper influence or pressure, whether overt or covert, will trigger an appropriate judicial response.

Dissenting Opinion of Mr. Justice Roberts

[65]

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 102—January Term, 1972

Appeal from Order of the Superior Court, October Term, 1970, No. 989, Affirming Adjudication of the Court of Common Pleas of Philadelphia County, Trial Division, June Term, 1930 No. 1005.

IN THE MATTER OF AMENDMENTS TO THE ARTICLES OF INCORPORATION OF THE DEFENDER ASSOCIATION OF PHILADELPHIA

Appeals of Bernard L. Segal and Louis B. Schwartz

FILED: July 2, 1973

ROBERTS, J.

I dissent from the majority's holding that the instant amendments to the Philadelphia Defender Association's articles of incorporation are "lawful", "beneficial" and "non-injurious to the community." In my view, the changes are distinctly to the contrary, and therefore do not comply

with Non-Profit Corporations Act, Act of April 29, 1874, P.L. 73, §42, as amended, 15 P.S. §7707. The amendments approved by the majority will undoubtedly destroy the necessary independence and non-political character of the Association. In turn, the challenged amendments create the inherent possibility of an unconstitutional conflict of interest, or at best, the equally objectionable appearance of such conflict.

Despite the majority's repeated assertions that the Mayor of Philadelphia will name only one-third of the Association's directors, the proposed amendments to the Defender Association's charter give the Mayor far more than this. He can now *directly* appoint one-third of the Board (10), and *indirectly* (through his ten appointees) appoint another one-sixth (5), for a total of one-half (15) of the Board (of 30). This appointing power of the Mayor, coupled with *control of the funds* and the power to terminate the contract on June 30 of any year, vests in the Mayor clear and realistic working control of the Defender Association.[1] The Board, effectively under the control of the Mayor, appoints the Defender, who is to serve, with his assistants, without a fixed tenure[2] and at the will of the appointing authority.

The Mayor, however, also controls the appointment of the Police Commissioner and the City Solicitor. Section 3-206 of the Philadelphia Home Rule Charter requires that the Mayor approve the appointment of the Police Commis-

[1] For less than 50%, and in the absence of funding, see also Public Utility Holding Company Act of 1935, §2, 15 U.S.C.A. §79b(a)(8) (10% ownership of voting securities is presumptive control); Investment Company Act, 15 U.S.C.A. §80a-2(a)(9) (25% is tantamount to control); see generally 2 Loss, Securities Regulation 770 (2d ed. 1961).

[2] See footnote 6 infra, and the accompanying text.

sioner; the annotation to that section notes "[t]he Mayor has a voice in the appointment process because the ultimate responsibility of City administration is his."

Section 3-203 of the Home Rule Charter gives the Mayor the responsibility of appointing the City Solicitor, one of whose functions is to investigate, "[w]ith the approval of the Mayor, . . . any violation or alleged violation within the City of the statutes of the Commonwealth of Pennsylvania or the ordinances of the City" and to "take such steps and adopt such means as may be reasonably necessary to enforce within the City such statutes and ordinances." Home Rule Charter §4-400(d). The annotation states that while it "is not intended to transfer to the Law Department the traditional powers of the office of the District Attorney, . . . it does empower the Law Department . . . to act in the law enforcement field." See generally *Specter* v. *Bauer,* 437 Pa. 37, 261 A.2d 573 (1970). Indeed, this residuum of authority has been used to bring prosecutions. See, e.g., *Commonwealth* v. *Stotland,* 214 Pa. Superior Ct. 35, 251 A.2d 701 (1969).

This governmental structure, whereby the Mayor not only appoints the Police Commissioner and City Solicitor, but also substantially controls the appointment of the Defender, raises serious questions as to the practical and working ability of the Defender Association to give undivided loyalty to those it represents. Certainly present is the real possibility that the Defender may be forced, or appear to be forced, to accommodate interests (of the Police Commissioner, City Solicitor, and perhaps ultimately the Mayor) which may be in direct conflict with the defense interests of those accused of crime. Since the City Solicitor and the Police Commissioner, and now, under the ma-

jority opinion, the Defender, are accountable to the same official—the Mayor— " . . . *might not a defendant with reason say that he feared he could not get a fair trial?*" *Tumey* v. *Ohio,* 273 U.S. 510, 533, 47 S. Ct. 437, 445 (1927) (emphasis added).

I.

The petition to amend the Defender Association's articles of incorporation, brought under the Non-Profit Corporation Act, Act of April 29, 1874, P.L. 73, §42, 15 P.S. §7707, to succeed, must show that the proposed changes are *"lawful . . . beneficial and non-injurious to the community."* (Emphasis added.) Section 7707 of the Act requires the proponents of an amendment to show *affirmatively* that the changes are both "beneficial" and "non-injurious to the community." The Legislature mandated that no amendment be allowed *unless* it improved or enhanced the organization's service to the community. Totally absent on this record is any such showing.

Despite the clear legislative directive for an affirmative finding of benefit, the trial court, without such a ruling nevertheless permitted the amendments. There was absolutely no showing that the Association's new structure, which gives the City 50% of the Board's membership and control, would be, in any sense, an improvement over the previously wholly independent and apolitical Defender Association. All that the proponents showed was that the City's funds were needed by the Association and that the City would not make funding available without naming one-half of the Board membership. Important as funds are for the continuation of the Association, funding is not the issue—the issue is and was whether the amendments

(giving control to the Mayor) were "beneficial" and "non-injurious to the community." 15 P.S. §7707, supra. On this issue the majority is in supreme error.

Since no adequate proof was offered by the proponents on this issue (in fact, all of the testimony offered was to the contrary), the amendments should be disallowed. That controlling and uncontradicted testimony is set out in pertinent part in Judge Spaulding's dissenting opinion in *Defender Association of Philadelphia Amendments of Articles of Incorporation*, 219 Pa. Superior Ct. 309, 313-21, 279 A.2d 240, 241-246 (1971) (dissenting opinion, joined by Hoffman, J.).

II.

Moreover, the amendments are impermissible for the more basic reason that they are not "lawful", 15 P.S. §7707, supra, since allowing control to pass to the Mayor creates the inherent possibility of an unconstitutional conflict of interest, or at the least, the appearance of impropriety.

Until today, this Court has been most vigilant in guarding against the possibility that defense counsel with a conflict of interest will harm his client's cause. We have heretofore held that "*. . . the mere existence of such a conflict vitiates the proceedings, even though no actual harm results. The potentiality that such harm may result, rather than that such harm did result, furnishes the appropriate criterion.* . . . The rule is not intended to be remedial of actual wrong, *but preventitive of the possibility of it.*" *Commonwealth ex rel. Whitling* v. *Russell*, 406 Pa. 45, 48, 176 A.2d 641, 643 (1962) (emphasis added). Accord, *Commonwealth* v. *Wilson*, 429 Pa. 458, 240 A.2d 498 (1968). Our focus on the "possibility" of harm is in recognition of

the fact that it is often difficult to determine, with hindsight, exactly where and how the conflict of interest harmed the client.

It may be that counsel was "effective" (*Commonwealth ex rel. Washington* v. *Maroney*, 427 Pa. 599, 235 A.2d 349 (1967)), but could have been more effective had he not been burdened with the conflict. See *Whitling*, supra at 49, 176 A.2d at 643; cf. Comment, "Conflict of Interests: Multiple Defendants Represented By A Single Court-Appointed Counsel," 74 Dick. L. Rev. 241, 249 (1970). However, effectiveness of counsel is not the test to be applied when dealing with counsel confronted with a conflict of interest, or the appearance of one. In such cases we have not deprived the defendant of his liberty, since the right to effective assistance of counsel (*Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963)) "*. . . is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.*" *Glasser* v. *United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467 (1942) (emphasis added). "*It is unchallenged that the Sixth Amendment guarantee of effective assistance requires the service of a lawyer who is not obligated to serve conflicting interests at the same time. . . .*" *Commonwealth ex rel. Gallagher* v. *Rundle*, 423 Pa. 356, 359, 223 A.2d 736, 737 (1966) (emphasis added).

This Court has also heretofore wisely been concerned with the possibility, inherent in a conflict of interest situation, of an appearance of harm. Courts have long been of the view that ". . . justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954) (Frankfurter, J.). Indeed, it is of vital importance that our system of criminal justice convey to defendants the belief that they are being dealt with fairly.

So too, "[t]he public must be satisfied that fairness dominates the administration of justice." *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 279, 63 S.Ct. 236, 241 (1942).

In *Tumey* v. *Ohio,* 273 U.S. 510, 47 S.Ct. 437 (1927), the United States Supreme Court held violative of due process a system for trying prohibition cases in which the mayor, as judge, imposed fines on behalf of the village, and kept the "costs" as his compensation. The Court emphatically refused to look into whether the defendant, *in fact,* had been harmed by this procedure. Id. at 535, 47 S.Ct. at 445. Rather, the Court stated:

> "With his interest, as mayor, in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he *feared* he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?"

Id. at 533, 47 S.Ct. at 445 (emphasis added). More than three decades later the Court reaffirmed this view in *Ward* v. *Village of Moneroeville, Ohio,* —— U.S. ——, ——, 93 S.Ct. 80, 83 (1972). The similarity between *Tumey,* supra, and *Ward,* supra, and the facts presented by the instant case is strikingly clear. The sense of justice and fairness expressed in *Tumey* and *Ward* controls here as well and requires similar treatment.

Certainly, an advocate who is free to pursue his client's interests is as essential an ingredient in the appearance of justice as is the impartial judge. Cf. *Anders* v. *California,* 386 U.S. 738, 87 S.Ct. 1396 (1967); *Gideon,* supra; *Commonwealth* v. *Jones,* 451 Pa. 69, 301 A.2d 811 (1973); *Com-*

monwealth v. *Fletcher*, —— Pa. ——, ——, —— A.2d ——, —— (1973) (Roberts, J., dissenting). As the United States Court of Appeals for the District of Columbia stated in *Suggs* v. *United States*, 391 F.2d 971, 974 (D.C. Cir. 1968):

> "It is of importance in the interest of justice that the final judgment against an indigent should not be compromised by the possibility that a different result would have ensued if only he had the resources to retain his own lawyer instead of being required to accept counsel selected by the court. *Much depends on a system that avoids suspicion of such compromise, for reasons that include awareness that where there is a basis for such suspicion prospects of rehabilitation are stifled. Justice must not only be done, it must appear to be done . . . . It is one thing for a prisoner to be told that appointed counsel sees no way to help him, and quite another for him to feel sandbagged when the counsel appointed by one arm of the Government seems to be helping another to seal his doom. . . .* [T]he courts must do what can reasonably be done to leave indigent prisoners with the impression that they have been dealt with fairly." (Emphasis added.)

In our adversary system of justice a defendant " . . . requires the guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64 (1932). See *Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S.Ct. 2006 (1972). The defendant must be convinced that the "guiding hand" acts *only* in his interest, unhindered by any divided loyalty. See *McKenna* v. *Ellis*, 287 F.2d 592 (5th Cir. 1961) (holding that representation of a defendant by two attorneys who were candidates for

jobs with the district attorney improper; accordingly, the judgment of sentence was reversed). As the Fifth Circuit said in *McKenna*, supra:

> *"We interpret the right to counsel as the right to effective counsel.* We interpret counsel to mean not errorless counsel, and not judged ineffective by hindsight, *but counsel reasonably likely to render and rendering reasonably effective assistance. We consider undivided loyalty of appointed counsel to client as essential to due process."*

280 F.2d at 599 (emphasis added).

A defense lawyer who has conflicting interests can hardly give the necessary appearance of undivided loyalty, regardless of how effective he may be in reality.

> *"[T]he indigent defendant is entitled to a lawyer who can give to his client undivided loyalty and faithful service. A lawyer forced, or attempting, to serve masters with conflicting interests cannot give to either the loyalty each deserves."*

Goodson v. *Peyton*, 351 F.2d 905, 908 (4th Cir. 1965) (emphasis added).

So too must be the case here, where public defenders, appointed and continued in office in large part by City Hall and *possibly appearing* to be controlled thereby, will conceivably be reluctant to provide the representation demanded by the Sixth Amendment. Clearly, the accused, while being represented by the Defender Association, may not feel "... that they have been dealt with fairly." *Suggs*, supra at 974.

Although the American Bar Association's Code of Professional Responsibility warns against the very conflicts inherent in the proposed "partnership" between City Hall and the Defender Association, the majority, paying no heed to the sound advice of this prestigious body, sanctions the inevitable appearance of impropriety.

"EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. *The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence.* A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

"EC 5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. *On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.*

"EC 5-23 *A person or organization that pays or furnishes lawyers to represent others possess a potential*

> ***power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client.*** **Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may see, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it.** *Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom."*

American Bar Association Special Committee on Evaluation of Ethical Standards, Code of Professional Responsibility, EC 5-21–EC 5-23 (Final Draft, 1969) (emphasis added) (footnotes omitted).

Not only does the Code of Professional Responsibility warn against "diluted" or "divided" loyalty, it also requires that a client be given an:

> *". . . opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires."*

Code, supra EC 5-16 (emphasis added).

Here, even after full disclosure of the possible conflict of interest, the indigent defendant has *no* effective alternative but to accept the representation of the Defender Association. Such a conflict, which surely would not be tolerated by a non-indigent defendant, will be unavoidable and undoubtedly acquiesced in by the indigent, having no other recourse. Such differing standards, depending on wealth, when dealing with the fundamental right to counsel, are prohibited by the Constitution. Cf. *Gideon* v. *Wainwright*, supra; *Douglas* v. *California*, 372 U.S. 353, 83 S.Ct. 814 (1963); *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956).

III.

The majority asserts that the potential conflict of interest will not materialize because vigilant watchdogs, like the losing parties here, will act to insure the Defender's independence. Further, the majority offers the additional suggestion that if improper political pressure is brought to bear on the Defender Association, "an appropriate judicial response" will be forthcoming. Such non-decisional assertions are absolutely nothing more than sheer speculation—one does not and should not structure an organization to provide defense services burdened at its start with the inherent possibility of a conflict of interest and then hope that somehow outside forces and perhaps the courts will neutralize the threat. Here, the "appearance of impropriety" condemned by the ABA Code of Professional Responsibility, supra at EC 9-6, is ignored by the majority.

Can the community which the Defender Association serves and the indigents it defends have confidence and trust in an Association significantly controllable by the Mayor, who also appoints the Police Commissioner and

City Solicitor whose interests are obviously those of the prosecution and antithetical to the defense? This potential conflict is even made more egregious by the reality of this record which reflects that the City Solicitor, appointed by the Mayor, has, in fact, also been appointed, by the Mayor, to serve as a Director of the Defender Association.[3] The majority frames the possible conflict of interest as "speculative." Here, however, there is nothing "speculative" about the *appearance* of divided loyalty and the possibility that harm may result. The appearance of conflict is undeniable, where the Philadelphia Home Rule Charter gives the Mayor responsibilities inconsistent with exercising power over an independent Defender Association.[4]

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[3] The City Solicitor was appointed to the Board on January 20, 1970.

[4] Other obvious conflicts exist between the Mayor and the Defender Association. As the record amply demonstrates, it was uncontradicted that prior to any negotiations (and as a condition precedent thereto) with the Association, the Mayor insisted that the Acting Defender, Martin Vinikoor resign. This demanded resignation, proved by the opponents and unrefuted by petitioners, was politically motivated, as Vinikoor had run for City Council, in the preceding campaign, on a ticket opposing the Mayor.

The record also discloses that on June 10, 1969 (at this time, the Defender Association was being primarily privately funded, in substantial part, by the United Fund) the Philadelphia Bulletin reported (on page 1) Police Commissioner (now Mayor) Rizzo's statement that he intended to stop police payroll deductions for the United Fund, since the United Fund also supported the Legal Aid Society. Commissioner Rizzo emphatically stated that organizations that "fight the Police Department . . . won't get a penny." The Philadelphia Bar Association, on June 16, 1969, roundly deplored, by resolution, the Commissioner's threat.

The Philadelphia Bulletin on August 27, 1969 (page 42) and on August 29, 1969 (page 1), under the headline "Rizzo Sets Up Meeting With Judge Carroll", reported a meeting, in Mayor Rizzo's office, attended by the District Attorney, the Commissioner of Police, the Mayor and several judges (including President Judge Carroll), at which the judges were pressed to change their "lenient"

In view of these facts, an indigent defendant, being represented by the Defender Association, may well assume, regardless of the actual merits of a particular course of conduct chosen by the Defender, that he is being "sandbagged" because ". . . counsel appointed by one arm of the Government . . . [may seem] to be helping another to seal his doom." *Suggs,* supra. In such circumstances, justice will not "appear to be done." *Suggs,* supra. For many of our citizens, legal services has reaffirmed faith in our government of laws. However, if we are to preserve the strength of the program, *we must make it immune to political pressures* and make it a permanent part of our system of justice." Message of The President (on the Legal Services Corporation Act) To Congress, Cong. Rec., S6212 (May 5, 1971) (emphasis added).

IV.

The only attempted justification for the challenged amendments advanced by the proponents is that 50% mayoral control is necessary to insure that the funds allocated by the City are properly expended. In essence, the argument advanced by petitioners, and accepted by the majority, is that since the City pays (as it is required to, *Argersinger,* supra; *In Re Gault,* 387 U.S. 1, 87 S.Ct. 1248 (1967); *Gideon,* supra) it is entitled to and must of necessity exercise control. Despite the fact that the City

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sentencing policies. (These events, although included in the opponents' brief, are not of record as they transpired after the hearing in the trial court).

The above events can hardly be viewed by the community and indigent defendants as an assurance that the City will in no way attempt to influence the criminal defense of those unable to retain private counsel.

is obligated to insure that its funds are properly spent, its involvement here is far in excess of that required to meet this task. Cf. *Commonwealth ex rel. Carroll* v. *Tate*, 442 Pa. 45, 274 A.2d 193 (1971) (involving more than $18,000,000 in Philadelphia funds).[8]

Uncontradicted testimony, including testimony of petitioners' witnesses (most importantly, that of the Court Administrator) undeniably established that the amount of control demanded by and granted to the City exceeds any legitimate budgetary interests. As the Court Administrator made clear, "... existing procedure through which his office channeled funds to the Association was neither inefficient nor a burden upon that office." *Defender Association of Philadelphia Amendments of Articles of Incorporation*, supra at 314, 279 A.2d at 242 (Spaulding, J., dissenting). Unrefuted testimony made clear that the City's legitimate concerns could be accommodated through contractual covenants regarding the service to be performed, audits and other fiscal supervision, plus an invitation for any interested official to attend directors' meetings. The record also shows that in the more than 38 years that the Association had been in operation, full information has always been made available—no public official or responsible community agency has ever claimed otherwise.

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[8] In *Commonwealth ex rel. Carroll* v. *Tate*, 442 Pa. 45, 274 A.2d 193 (1971), where this Court ordered the City of Philadelphia to appropriate approximately $2,500,000 in additional funds to the Philadelphia Court of Common Pleas (in addition to approximately $16,000,000 already appropriated) for fiscal year 1970, the City at no time even suggested the need for any controls in any sense similar to those here approved by the majority. Obviously the usual government audits were sufficient there, as they are here, to maintain fiscal integrity. There has been no suggestion to the contrary.

Here, where the fundamental right to counsel (counsel free from the appearance of a conflict of interest) exists, the City's action must be viewed as an "overly broad" restraint on an indigent defendant's Sixth Amendment right to *independent* representation. Cf. *Gideon,* supra; *Goodson* v. *Peyton,* supra. The "chilling effect" (on confidence in the Defender's undivided loyalty to his client) produced by the City's significant power of control of the Association may be substantial. Cf. *NAACP* v. *Button,* 371 U.S. 415, 83 S.Ct. 328 (1963). Testimony by petitioners' own witnesses indicates that "less drastic" means could be utilized to insure fiscal integrity. Hence, the Defender's structure, today approved by the majority, is unconstitutional as an overly broad interference with indigent defendants' Sixth Amendment right to counsel. Cf. *Button,* supra; *Shelton* v. *Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252 (1960); *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 S.Ct. 900 (1939). Although the City's monetary concerns are legitimate, these concerns ". . . cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton,* supra at 488, 81 S.Ct. at 252 (footnote omitted).

V.

The majority's error, in my view, is compounded by its failure to give anything more than lip-service to the American Bar Association Project On Minimum Standards For Criminal Justice, Standards Relating To Providing Defense Service (Approved Draft, 1968). These standards, as the title indicates, devised as *minimum* guides for providing criminal defense services to indigent defendants, are in direct conflict with the structure the majority today approves.

"The plan should be designed to guarantee the integrity of the relationship between lawyer and client. *The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and the same extent as are lawyers in private practice.* One means for assuring this independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees. . . ."

Standards, supra §1.4 (emphasis added).

The Commentary to Section 1.4 provides:

"A system which does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain. Inequalities of this nature are seriously detrimental to the fulfillment of the goals of providing counsel. They are quickly perceived by those who are being provided representation and may encourage cynicism toward the justness of the legal system and, ultimately, of society itself. Much of the dispute concerning the merits of various systems has centered on their capacity to guarantee professional independence. . . . [T]he necessary independent [can] be guaranteed under any type of system, from public defender to assigned counsel, *if and only if the system is properly insulated from pressures, whether they flow from an excess of benevolence or from less noble motivations.* See EQUAL JUSTICE FOR THE ACCUSED 61, 67, 71, 74-75.

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"An independent governing board is the appropriate method of control of such a system, [public defender] EQUAL JUSTICE FOR THE ACCUSED 83-84.

"Whatever the type of system employed, placing responsibility for its operation in a specially designated board outside the ordinary framework of state or local government will assist in guaranteeing sufficient independence and adequate supervision. It will also help to ensure that the task of providing counsel is not submerged in the welter of other problems of government.

"Because the board would exercise general supervision over the policies and operations of an agency composed of lawyers performing professional work, *the board should be composed of lawyers.* See APPLICATION OF COMMUNITY ACTION FOR LEGAL SERVICES, INC., 26 App. Div. 2d 354, 274 N.Y.S.2d 779, 787-88 (1966).

"*Prosecutors* and judges *should be excluded* from the membership of governing boards to remove any basis for an implication that defense attorneys under the system *are in any way subject to the control of those who appear as their adversaries or before whom they must appear* . . . ." (Emphasis added.)

Section 3.1 of the Standards, supra, states:

"A defender plan should be designed to create a career service. *Selection of the chief defender and staff should be made on the basis of merit and should be free from political, racial, religious, ethnic and other considerations* extraneous to professional com-

petence. *The tenure of the defender and his staff should be protected similarly....*" (Emphasis added.)[6]

The Commentary to that Section (3.1) notes:

> "[T]here is widespread agreement that it is essential that a defender be free from political influence. The independence of the defender is fundamental to both the fact and the appearance of zealous representation of the accused. One of the chief recommendations of the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid Association was that the *public defender should be appointed and given tenure 'in such a manner as to eliminate or minimize political and other influences which might affect his professional independence and his loyalty to his client.'* EQUAL JUSTICE FOR THE ACCUSED 31. See also *id.* at 92." (Emphasis added.)

It is clear that the amendments sanctioned by the majority fail to adhere to either of the above noted standards.[7] Freedom from "political influence" quite patently does not mean the kind of "City Hall" control, approved by the majority. Further, the Mayor's refusal to deal with the then Defender Martin Vinikoor (see footnote 4, supra) can

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[6] See also Uniform Law Commissioner's Model Defense of Needy Persons Act, §10(a)(1) (Defender's term of office to be not less than six years); National Conference on Criminal Justice, Standard 13.8 (January 23, 1973) (Defender's term of office to be not less than four years).

[7] See also National Defender Project, Handbook on How to Organize a Defender Office (1967) (recommends providing "... a screen between the defender and 'City Hall'" and for minimizing "... the influences of partisan politics" (p. 31)).

hardly be conceived of as an indication that the City's actions will be free from "political considerations." And finally, the City's refusal to provide the Defender and his assistants with tenure, is not only contrary to §3.1 of the Standards, supra, and other authorities noted in footnote 5, supra, but also is assurance that one acting in conflict with the wishes of the Mayor can be removed at any time by the Board of Directors, a Board substantially controlled by the Mayor. (As noted above, the City Solicitor has been appointed to the Board of the Association, despite the recommendation of the Commentary to Section 1.4 of the Standards, supra.) No justification for this flagrant disregard of professional standards has been advanced by the majority, and indeed, none can be imagined.

VI.

From July 1, 1971, to June 30, 1972, the Defender Association disposed of 14,099 criminal cases in the courts of the City of Philadelphia. (Approximately 500 additional cases were handled by the Defender in the United States District Court.) Defender Association of Philadelphia, 38th Annual Report of The Directors 23 (1971-72). During a comparable period, January 1, 1972, through December 31, 1972, the Philadelphia Court of Common Pleas disposed of 21,727 criminal (including juvenile) cases. 1972 Annual Report of the Philadelphia Common Pleas & Municipal Courts 1. Assuming that the figures for these two twelve month periods are comparable, the Defender Association handles more than 63% of all criminal cases disposed of by the Philadelphia Court of Common Pleas. The Defender's monetary expenditure for the 1971-72 period was approximately $2,000,000; $1,500,000 represents the amount appropriated by the City. Defender Report, supra at 26-27.

As previously noted, the City of Philadelphia is obligated to provide free defense services for indigents accused of crime. *Argersinger,* supra; *In Re Gault,* supra; *Gideon,* supra. Accordingly, the City, *even absent the control now afforded it by the majority,* is constitutionally required to allocate funds for the representation of indigent defendants. The City, having this affirmative duty, cannot escape it, even if the amendments (as they should be) were disallowed. As this Court made clear in *Commonwealth ex rel. Carrol* v. *Tate,* supra at 52, 274 A.2d at 197, the judiciary possesses " . . . the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice . . . ." Clearly nothing could be more central to the administration of justice than counsel for the accused, and court appointed counsel where necessary. *Argersinger,* supra; *In Re Gault,* supra; *Gideon,* supra.

The majority, accordingly, has today given the City control in exchange for its contract to do that which it is legally obligated to do, that is, to provide funds for the representation of those defendants who are unable to pay. The losers in this transaction are unfortunately the citizens of Philadelphia who have lost the services of a heretofore wholly independent and non-politicized Defender Association.

VII.

It is inescapably clear that the majority has ignored the specific statutory language of the Non-Profit Corporations Act, supra, and approved amendments that are neither "lawful", "beneficial" nor "non-injurious to the community."

15 P.S. §7707, supra. Additionally, the majority has paid no heed to the strong public policy and constitutional considerations involved in keeping the Defender Association free from the spectre of external government and political pressures. Instead, it has gone in the opposite direction. The record makes clear to a firm and unquestioned certainty that the amendments diminish the ability of the Defender Association to perform its primary objective of independent representation for indigent defendants.

Today, the majority has given its aid to making the Association considerably less effective and less independent than it was prior to the amendments. This the majority has accomplished by compelling a "partnership" between the Defender Association and the Mayor of Philadelphia, a Mayor who at the same time is responsible for law enforcement under the Home Rule Charter. Hence, the Association cannot now be or appear to be professionally independent and "free from political influence."[8] Nor can it be free from the inherent possibility of a conflict of interest which may harm its clients. It is no longer a Defender Association calculated to insure that there will always be at least the "appearance of justice."

The majority's determination evokes earnest disagreement and compels strong dissent.

Mr. Justice Manderino joins in this opinion.

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[8] "Nothing could now be clearer than that a professional legal services program [or defender association], one with which the bar can cooperate and support, *must have an independent, non-political base* rather than be part of an agency [or city government] whose outlook and direction change with political winds and fortunes." 59 American Bar Association Journal 523 (May, 1973) (emphasis added).

Per Curiam Judgment and Dissenting Opinion in the Superior Court of Pennsylvania

DEFENDER ASSOCIATION OF PHILADELPHIA AMENDMENTS OF ARTICLES OF INCORPORATION

Argued September 21, 1970. Before WRIGHT, P. J., WATKINS, MONTGOMERY, JACOBS, HOFFMAN, SPAULDING, and CERCONE, JJ.

Appeal, No. 989, Oct. T., 1970, from order of Court of Common Pleas, Trial Division, of Philadelphia, June T., 1930, No. 10005, in re Amendment to Articles of Incorporation of the Defender Association of Philadelphia; appeal of Bernard L. Segal and Louis B. Schwartz, members of the Association. Order affirmed.

Proceedings upon application for amendments of charter of a nonprofit corporation. Before McDEVITT, III, J.

Adjudication filed approving amendments to articles of incorporation. Objectors appealed.

Louis B. Schwartz, with him *Bernard L. Segal* and *Dennis Eismore,* for appellants.

Edward W. Madeira, Jr., with him *Vincent J. Ziccardi,* for Defender Association of Philadelphia, appellee.

Judas I. Labovitz, Thomas Gilhool and *Thomas B. Harvey, Jr.,* for American Civil Liberties Union, intervenor.

OPINION PER CURIAM, June 30, 1971:

Order affirmed.

DISSENTING OPINION BY SPAULDING, J.:

I respectfully dissent.

Appellants, members of the Defender Association of Philadelphia, and previous members of its Board, challenge the approval of certain amendments to the Association's charter by the Court of Common Pleas of Philadelphia.

I

The Defender Association of Philadelphia traditionally has been a "private" group engaged in the defense of indigents accused of crimes. Prior to March 1969, the Association had been operated by a fifty-man Board of Directors elected by the dues-paying membership. Its financing came from various sources, including the United Fund of Philadelphia. When *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), established that local governments were constitutionally required to provide funds for the defense of indigents accused of crime, the City began to supplement the Association's income. When it became apparent, in January 1969, that a contribution of $1,250,000 would be necessary, the City Administration determined that it would assume control of the Defender operation. However, a proposed ordinance (Bill 830), establishing a public defender office, with the Defender to be appointed by the Mayor, caused considerable public indigation. As a compromise, the Association-City contract was reached. Under this contract, the City would not create a new organization, but would provide the necessary operational funds for the Defender Association, which, in return, would amend its charter to restructure the Board of Directors: ten directors would be chosen by the City, ten by the Association, and ten by the combined group of twenty.

The Association's existing Board approved this arrangement by a 19-16 vote. On March 28, 1969, the Association (proponents) submitted to the Court of Common Pleas a series of amendments which made the following changes: (1) a phrase permitting reference of clients by charitable organizations was deleted (art. II); (2) the change in the structure of the Board of Directors was added (art. VII); (3) the article limiting yearly income receivable was deleted (art. XI). Objections were filed by appellants (objectors). Judge JOHN J. MCDEVITT, III, held a hearing and approved the amendments in an "adjudication" filed on August 8, 1969.

II

The petition to amend the Association's charter was brought pursuant to the Pennsylvania Nonprofit Corporation Act, 15 P.S. 7707, which provides that the court shall approve charter amendments if they are "lawful" . . . beneficial and not injurious to the community". The lower court, after a lengthy summary of the respective arguments stated that "[it] cannot accept the arguments that the revised Charter would create a corporate monster outside the contemplation of the Nonprofit Corporation Law which is clearly unlawful, not beneficial and would be injurious to the community. . . . " The court concluded by saying: "We do not decide the problem before the Court on the basis that the contract with the City requiring an amendment of Articles of Incorporation represent [sic] the better choice of two evils. Actually in our opinion the Defender Association service to the community will be more beneficial than in the past. Believing that the Board of Directors will be 'independent' the Association *will now be adequately financed and in a position to meet the increasing*

demand for legal representation as required by the Constitution and court decisions." (Emphasis added.)

Section 7707 of the Nonprofit Corporation Act states a requirement for a positive finding that amendments be "beneficial", as well as the determination that they are "not injurious". This wording does not indicate a balancing of benefits and detriments but required a finding of positive benefit. The term "beneficial" does not appear in the analogous provision for amending a corporation charter under the Business Corportion Law. 15 P.S. §§1801-1810. The Legislature evidently intended that in the case of non-profit corporations, the charter should not be amended unless the amendment improved the organization's service to the community. At the very least, the term must require a finding that the amendment is for the community good.[1]

In my view, the findings of the court below do not meet the requirements of §7707. Of the amendments, the court states only that they would not "create a corporate monster" which is "clearly unlawful" or "not beneficial" or "injurious to the community". It appears that what the court found beneficial was not the amendments themselves, but the total contractual arrangement. It is undeniable that an increase in funds is beneficial to the Association, but that does not meet the question whether the structural change is in fact beneficial to the community. Since the merits of the contractual arrangement were beyond the scope of the amendment hearing below, the decision on

[1] While a new optional provision of §7707 permits filing of amendments to the charter of a non-profit corporation without court approval, that is not determinative of the proper decision for the court in this case. Further, the new provision does not overrule the present section, and it is not at all clear what effect it will have on the substantive standards enunciated for amending the charter.

the validity of the amendments should have been made without reference to the underlying contract.

III

On the issue of the propriety of the amendments themselves, the court below states that the burden of proof falls upon the proponent Defender Association, and that this burden was met. However, a review of the four volumes of notes of testimony clearly substantiates objectors' contentions that the amendments were neither "beneficial" nor "non-injurious to the community". Rather, the testimony of both parties indicates (1) no showing that the proposed structure was necessary for accomplishing any beneficial purpose; and (2) a net loss of benefit amounting to "injuriousness". In no sense does the testimony warrant the conclusion that the Association did in fact meet its burden of proof.

Testimony on the need for the proposed structure, or the purpose it was to serve, was at best inconclusive. Although the circumstances suggest that the City's intention was to acquire virtual control over the Association's policy,[2] the proponents never explicitly stated that this was the purpose of the amendments. Their position seemed to be that the increased membership on the Board was only the indirect result of the City's need to oversee the use of its financial contribution. In fact, however, their evidence made no showing that such extensive representation was needed.

The Court Administrator, Edward J. Blake, Esquire, testified for the proponents that there was a financial interest involved. (Blake, R. 27, 30, 40.) But he also conceded that

[2] I find that such control would create an unconstitutional conflict of interest. See part IV, infra.

the Association had never been charged with financial mismanagement or inefficiency (R. 47), and that the existing procedure through which his own office channeled funds to the Association was neither inefficient nor a burden upon that office. (R. 39.)

The objectors' testimony showed that existing safeguards and standard corrective procedures used by the City, were more than adequate to protect its interest in fiscal supervision of the increased funds.

District Attorney Arlen Specter testified: "I think that there are ways that the City can check on the expenditures in a proper way to see to it that their interests are taken into account; that there not be waste. For example, in my office I have very substantial restraints which are imposed under the law, and I think it could be applied to the Defender, in terms of every appointment that I make has to be approved by personnel and by finance, and there are classifications of expenditures, Class 100, 200, 300 and 400, without getting into details, and I would say that they are very onerous and that they are unduly restrictive, but certainly I think it could not be said that they are not restrictive enough. And I could illustrate it in a nut shell by the recent experience I have had in seeking to raise the salaries of my Assistant District Attorneys, where I concluded that I had a clear cut right to do so and even though I am an independently elected official who is not answerable to the Mayor or the City Council, only to the voters, and even though I had a very strong charter for authority for what I was to do, the mechanism of City Government, the Finance Department, was able through its own restraining influence, which would exist to anybody the City pays, to hold up that money for a protracted period of time. The matter was litigated before Judge Bradley, who upheld it

and it was in the Supreme Court before the City abandoned their position. So that there are ample safeguards which would exist through normal City procedures to see to it that there are appropriate expenditures, to say nothing of the Controller's Office. . . ."

Former Councilman David E. Cohen testified: ". . . I don't see the need for this. I have been going through public budget hearings and Democratic caucus which involved the contemplated expenditure in the next year of much more money than I can begin to even grasp, have any knowledge of what it means—something like three quarters of a billion to a billion dollars. The money in a number of instances passes through other organizations, in some instances they are outright donations. The City has representation. I am a member of the Pennsylvania Academy of Fine Arts at the Board of Directors representing the City, but I sit as one member of the Board of Directors of some 25 or 30. I go over carefully all of the financial statements and the minutes of the meetings, but we don't have any kind of representation which gives the City the sense of realistic control. At the same time, I feel my responsibility deeply with respect to whatever contribution of City monies is involved, to see that they are expended in the best possible way. . . . I don't know why the City ought not to have some members on the Board of Directors, either voting or ex officio, who make it their business—as most of the City Council representatives do now who are assigned to membership on the Board of Directors, who make it their business to keep abreast, to raise with other Councilmen, to raise with the organization, any questions they have with respect to policy. Then, in addition, the City has the full opportunity

each year to subject at public hearings the officers of these organizations to whom the City is contracting money, to raise any question of policy as to what the organization does and how it utilizes City funds. So it seems to me that we already have established traditionally a very fine mechanism that could work here and could at the same time move in the direction of achieving the maximum possible independent kind of representation consistent with some basic safeguarding of the City's interests in the large sums of money to be invested here." (R. 609-612.)

Former Councilman Henry Sawyer also presented extensive testimony showing that the City's usual treatment of "purchase of service contracts" did not involve anywhere near the amount of representation demanded here. (R. 509-510.)

As to the injurious nature and undesirability of the new arrangements, the objectors presented striking testimony which was not in any way contradicted by the proponents. As well as District Attorney Spector, former Councilmen Cohen and Sawyer, cited above, the objectors' witnesses included such disparate public figures as First Assistant District Attorney Richard Sprague, Professor Norman Dorsen of the New York University School of Law and Martin Vinikoor (the former Chief Defender whose resignation the City made a condition precedent to contractual negotiations).

The following testimony was particularly pertinent: Former *Councilman Cohen*: "I think that the kind of influence that City government should have, naming half of all those that are being named—that is the 10 by the City as against the other 10 and, as I understand, that those 20 naming the third set of 10, whom I would assume would

at least half represent the City and perhaps half represent whatever interest there are, it seems to me that that degree of control destroys the whole concept of independent representation. . . . I think it places someone under the great strain and I think it denies the defendant the kind of independent representation he ought to have in the form of a lawyer who is completely fearless at the Bar and dedicated within the limits of legal ethics to a zealous, outspoken, forward defense of his client." *District Attorney Specter* "Q. Just rephrasing the question, considering the proposed structure of the Defender Board with the role of the City as I have just indicated to you, being one-third of the members appointed by the Mayor and that one-third having a chair in the decision as to another third, do you consider that to be a desirable arrangement with regard to the influence or power of the City of Philadelphia, vis-a-vis the Defender Association? A. I think that arrangement is undesirable . . . A. Well, Judge McDevitt, I think that a Defender Association should operate to give independent representation to those who must have representation at public expense. I think it should be totally nonpolitical. I think it should be operated with a view to merit selection of Assistants, with a view to an efficient operation and with a view to a professional operation without any outside strains to regulate it in any way. . . . What I have seen of organizations which have governmental strains and which are subject to the regulation of the Mayor's office and the City Council, to put it directly, it has not fulfilled that criterion. Q. In regard to one of your standards, that it be an independent form of representation, what is the danger, if any, that you see in having Assistant Defenders who may be appointed either through political influence or appointed because of political approval of their selection

has been involved? A. Well, the problem that I see is that if you have political control over the Defender's Office, so that somebody in a high position can dictate who is going to get the job, then you do not get the best man to start with; you do not have the ability of his supervisor to regulate his work in terms of his hours, in terms of the absence of a private practice, which I think is indispensable to run an office of this sort; you do not have unfettered discretion on his part, because he has allegiance to those who have employed him; and you do not have the unfettered ability of the man in charge to see to it that he does his job. . . . Because if there are political appointing powers and there are political factors, they lurk in the background and have no place in either the prosecution or defense of criminal cases. . . . Q. Based upon your experiences with municipal governments, in a sense a municipal official and dealing with a municipal official, do you know of any legitimate City of Philadelphia interest that requires the City of Philadelphia to take the share of control of the Defender Association that this proposed contract and these proposed amendments set forth? A. . . . I think that the proposal gives too much control to the City in terms of the nature of legitimate concern and the proven ability of the Defender Association to operate. . . ." *Assistant District Attorney Sprague* "Q. Now, from the standpoint of having been at one time a Defense Counsel and now being a Prosecutor, being aware of what some of the problems that the Defense Counsel faced, do you believe that the measure of City involvement in the operation of the Defender Association as now proposed by these amended articles would possibly have or in fact have some effect on the judgment or independent judgment of Assistant Defenders trying cases? A. I think it could. The

basis of my answer is that again I'm aware of the extent to which, say, the Police Department, people from the City Administration, are interested in—from the Prosecutor's side, we call it the war on crime. And to the extent that the Police, through whatever levels of people in the Administration could perhaps have a say over policies by those defending people we're warring on, and there in my opinion will be a reaching into that area and intimidation getting people to back off certain action that they might otherwise take, and I think and I feel that the people employed unfortunately are not always the most resolute and if they're aware of the powers over them, they might not take as forthright a stand as they otherwise would if they were completely independent."

Further, it is noteworthy, that proponents' witnesses did not refute any of the above testimony. In fact, they must be taken as further substantiating objectors' contentions. Thus, Edward J. Blake, Esquire, testified: "Q. Are you aware that the City of Philadelphia through the City Solicitor's Office has asserted and that there has been an opinion in the Court of Common Pleas of Philadelphia that the City may prosecute violations of the Mayor's ordinance—the Mayor's emergency ordinance powers as well as the District Attorney may prosecute those particular criminal actions? Are you aware of that, sir? A. Well, I'm certainly aware of it, yes. Q. And are you aware, therefore, that the City Solicitor could very well be appearing in cases where indigent defendants charged with violation of the Mayor's proclamations are represented by the Defender Association? A. Yes, indeed. Q. Do you not see some conflicts of interest where the Defender Association Board is appointed one half by the Mayor with the ap-

proval of Council and the prosecutor in those cases, the City Solicitor, is appointed by the Mayor with the approval of City Council, and the Police Commissioner, whose officers are the arresting officers, is appointed by the Mayor also? A. No. I believe that the *remainder of the Board, being appointed by some officers other than the Executive, would give an independent character to the Association.*" (R. 56-58.) (Emphasis added.) . . .

Other testimony presented by the proponents is also revealing. The testimony of Pace Reich, Esquire, an Assistant City Solicitor, and Herman Pollock, a former Chief Defender, follows:

Pace Reich testified: "Q. Isn't the reason, as a matter of fact, each and everyone of the corporations that you picked off yesterday, Port Development, Industrial Development, Food Distribution Center, Housing Development Corporation, were set up in the particular manner they were set up to enable the City to have more flexibility in dealing with these areas than the City would have under the charter provisions which in many areas would make it difficult to negotiate contracts and agreements? A. I think that's a major consideration. I don't think I'm capable of going into all the considerations, since many of those were set up by the other persons and I did not—was not involved in it. I was involved in the setting up of both Bicentennial Corporation and the Port Corporation, and while it is hard to determine what was in my mind as to why we needed the representation, *I think as a general matter I can say it's because the City had a very substantial overall interest in that particular activity, just as I conceive that they have a substantial overall interest in this activity.*" (R. 638-639.) (Emphasis added.)

Herman Pollock testified: ". . . Let me say right now that I am in agreement with a great deal that has been said with regard to the type of services that must be supplied, and as a member of the negotiating committee dealing with the City, the members of the committee and myself fought hard to see that there was the kind of independence which would make this a viable organization and one which would be as free from control, political, judicial or economic, as we could possibly make it. We arrived at this not because it's the best system. I don't think it is at all. I would like to have the government give $1,200,000.00 to the Defender organization as it now is, just as Mr. Schwartz and Mr. Segal would. . . . Now, if you are going to get somebody there who isn't decent, if you are going to get a corrupt City government, . . . " (R. 590-591.)

None of the proponents' witnesses in any way contradicted any of the objectors' claims. Most importantly, there was no disagreement with the objectors' basic contention that the Defender must have the "freedom from political influence" emphasized throughout the American Bar Association's Standards Relating to "Providing Defense Services" (Standards drafted by a committee headed by Chief Justice BURGER, and including Chief Judge HASTIE of the Third Circuit Court and Herman Pollock).

Section 1.4 of those Standards states: "The plan should be designed to guarantee the integrity of the relationship between lawyer and client. The *plan and the lawyers* serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. One means for assuring this independence, regardless of the type of system adopted, is to place the

ultimate authority and responsibility for the operation of the plan in a board of trustees. . . ." (Emphasis added.)

At no time did proponents' witnesses disavow these standards which unequivocally require that "the plan" as well as the lawyers be free from political influence. Rather, these witnesses continually attempted to reconcile the proposed Defender Association charter amendments to the ABA standards by appealing to "practicality". As stated above, neither "practicality" nor the desirability of adequate financing is of concern in this case.[3] The issue is whether the new structure does in fact meet the "beneficial and non-injurious" requirements of §7707. I find that it does not.

IV

Section 7707 also requires that the proposed amendments be "lawful". The term "lawful" must be interpreted as requiring not only that no illegal corporate activity be authorized, but also that the authorized corporate activity conform to the requirements of the Constitution.

The lower court's adjudication characterizes objectors' complaint that the proposed structure creates an unconstitutional conflict of interest as merely "speculative", and states that the question of "adequacy of defense counsel including conflict of interest" can be raised case by case in collateral proceedings. It was error to treat conflict of interest as part of adequacy of counsel, since our courts have approached these matters quite differently. On adequacy of counsel, actual harm must be shown, and the standard is

[3] In oral argument before this Court, both parties stated that the City would continue to fund the Defender Association regardless of the outcome of this litigation.

whether counsel's chosen course was reasonable in light of the alternatives. *Commonwealth ex rel. Washington* v. *Maroney,* 427 Pa. 599, 235 A. 2d 349 (1967). This can only be determined on a case by case basis.

On conflict of interest, however, the question is not whether harm has been caused, but whether defendant's interests were represented by counsel. The very essence of *Gideon* was to make the right to representation absolute rather than dependent on a showing of actual harm. In our determinations on conflict of interest, "The potentiality that such harm *may* result, rather than that such harm *did* result, furnishes the appropriate criterion." *Commonwealth ex rel. Whitling* v. *Russell,* 406 Pa. 45, 48, 176 A. 2d 641 (1962). (Emphasis in original.) The claimant must "at least show the possibility of harm", *Commonwealth* v. *Wilson,* 429 Pa. 458, 240 A. 2d 498 (1968). This possibility may be shown either by the inherent inconsistency of positions represented by counsel, or by specific facts indicating that counsel favored one defendant over another. Only the second type of conflict requires a case by case factual determination.

This Court has been particularly stringent in scrutinizing representation for both inherent and specific conflict. See *Commonwealth* v. *Werner,* 217 Pa. Superior Ct. 49, 268 A. 2d 195 (1970) (conflict arising in failing to call a co-defendant who could exculpate appellant); *Commonwealth* v. *Bostick,* 215 Pa. Superior Ct. 488, 258 A. 2d 872 (1969) (conflict arising from counsel representing two co-defendants, one of whom pleaded guilty and one of whom pleaded not guilty to charges upon which they were jointly indicted); *Commonwealth* v. *Cullen,* 216 Pa. Superior Ct. 23, 260 A. 2d 818 (1969) (conflict of interest at sentencing); *Commonwealth* v. *Calvert,* 216 Pa. Superior Ct. 221, 263 A. 2d 770 (1970) (concurring and dissenting opinion by

HOFFMAN, J., joined by SPAULDING and CERCONE, JJ.) (conflict arising from counsel noting Calvert's longer record in a plea for greater consideration for his co-defendant).

Here, there is an inherent conflict of interest. Proponents contend that this allegation is mere conjecture. But the testimony clearly established, again without contradiction, that the City's interests diverge sufficiently from the Association's interest in providing strong, effective representation to create, "the possibility of harm" required by *Wilson*, supra. The City's insistence upon Mr. Vinikoor's ouster as head of the Association, is an example. There was no question that Vinikoor was eminently well qualified for the position of Defender. Rather, opposition was based upon political reasons. Following Vinikoor's resignation, the City concluded the agreement with the Association resulting in the charter amendments described above.

Other specific public instances which indicate the erroneous nature of characterizing objectors' claims as "speculative" are: the former Police Commissioner's stated intention (June 10, 1969) to discontinue police payroll deductions for the United Fund because the Fund allegedly supported organizations which oppose the police department policies and his attack on Community Legal Service attorneys involved in police brutality cases.

Previous cases on conflict of interest have dealt with situations in which a single attorney is defending two clients at the same trial. Here the situation is even more potentially harmful. There is no assurance that the harm which may ensue will arise in a manner which even calls upon judicial supervision. As compared with the question of conflict of interest in a particular trial, here there is no transcript for the court to consider. We have no way of assessing when and to whom the harm may be done. How-

ever, the *risk* of harm that may ensue—despite the best intentions of all concerned—and which will not necessarily be subject to correction, is too great to permit the "wait-and-see" approach suggested by the lower court.

Constitutional rights cannot be placed in jeopardy by any group of individuals no matter how earnest and well-meaning they may appear to be. In *Tumey* v. *Ohio*, 273 U.S. 510 (1925), the Supreme Court held that a judicial officer could not constitutionally be permitted to have a pecuniary interest in the outcome of convictions rather than acquittals. The Court held that such an interest must disqualify the judicial officer notwithstanding. " . . . the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man . . . or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law." (273 U.S. at 532.)

The instant case presents such a danger, and it is likely to arise in situations of which our courts could not be cognizant. Numerous decisions are made involving the manner and method of representation which would necessarily entail additional expense for the community: notably, refusal to plead guilty, demand for jury trials, and diligent prosecution of appeals. The City's representatives would be forced to take budgetary matters into consideration when reaching decisions of this type.

Further, there are political questions that inevitably arise in planning the overall representation of indigent defendants. Conscientious defense would require strong attacks on certain official policies (e.g., courtroom practices, probation services and the adequacy of pre-trial detention

facilities.) For example, the problem of the unbearable summer heat on the 7th floor of City Hall was only resolved by the Association's "threat" to demand more jury trials for its clients. It is not conjecture to state that the City's representatives would attempt to minimize such tactics whenever a sufficient threat to their policies is presented. The potential for harm through conflict of interest is so great, that the present structure should not be allowed to stand.

V

Since *Gideon,* supra, the courts have attempted to insure *effective* assistance of counsel by imposing additional safeguards. *Commonwealth* v. *Baker,* 429 Pa. 209, 239 A. 2d 201 (1968); *Commonwealth ex rel. Washington* v. *Maroney,* supra; *Commonwealth* v. *Wilson,* supra. Although these efforts have been geared directly to the particular attorney-client relationship presented in each situation, the constitutional standard enunciated by the Federal and Pennsylvania courts must be applied to the organization assuming the obligations of providing counsel. The Defender Association exists solely to provide the effective, independent counsel mandated by the above decisions. We cannot allow the City to severely restrict that very independence and effectiveness by placing an unjustifiable condition upon its financing of that organization. That this condition is in fact arbitrary is amply supported by the testimony showing that the City's legitimate financial interest is adequately provided for by other means.

I would reverse the order of the lower court and remand the case with instructions to determine the extent of City representation consistent with its legitimate fiscal and auditing role.

HOFFMAN, J., joins in this dissenting opinion.

Adjudication of Court of Common Pleas of Philadelphia

IN THE

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

Common Pleas Court No. 5

June Term 1930

No. 10005

IN RE:

AMENDMENTS OF ARTICLES OF INCORPORATION OF DEFENDER ASSOCIATION OF PHILADELPHIA.

ADJUDICATION

McDEVITT, J.

The proposed amendments of Articles of Incorporation of Defender Association of Philadelphia was referred by the President Judge of the Court of Common Pleas to Judge John J. McDevitt, 3rd, for a hearing and determination.

Testimony of proponents and objectors was taken on four days in April and May of this year totalling some 643 pages of transcript. This seemed to offer a full opportunity for the interested parties to express their views and opinions. There was agreement that the limited number of wit-

nesses called would be sufficiently representative of the community and present a cross-section sampling of views and responsible opinion in the City of Philadelphia.

The Court has been assisted in arriving at a decision by the professional advocacy of counsel for the proponents and objectors. Certainly the same observation applies to the witnesses as well as some of whom traveled a considerable distance.

On behalf of the Defender Association the following testified:

Joseph N. DuBarry, 4th, Esq.—President

Edward J. Blake, Esq.,—Philadelphia Court Administrator speaking for President Judge Vincent A. Carroll of the Court of Common Pleas as well

John J. Cleary, Esq., Deputy Director of the National Defender Project, a grant activity of the National Legal Aid and Defender Association.

Herman Pollock, Esq., for many years the Defender and more recently holding the title of Counsel to the Association.

Pace Reich, Esq., Assistant City Solicitor

On behalf of the objectors appeared:

Arlen Specter, Esq., District Attorney of Philadelphia

Richard Sprague, Esq., his First Assistant

Martin Vinikoor, Esq., former Defender

Stanford Shmukler, Esq.

Jack B. Justice, Esq., Chairman of the Southeastern Pennsylvania of Americans for Democratic Action

Edmund E. DePaul, Esq.

Norman Dorsen, Esq., Professor of Law, New York University

Henry W. Sawyer, 3rd, Esq.

Stephen A. Sheller, Esq.

Alvin E. Echols, Jr., Esq., Executive Director of the North City Congress

David Cohen, Esq., City Councilman

The Defender Association of Philadelphia was incorporated under the provisions of the Pennsylvania Non-Profit Corporation Law on April 14, 1934 and has since that time provided legal defense services in Philadelphia to indigent persons accused of crime. For years and until more recent years the Association operated without financial assistance from the City of Philadelphia. Decisions of the United States Supreme Court such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) and *In re Gault*, 387 U. S. 1 (1967) greatly expanded the obligation to provide counsel for the indigent. The obligation to provide counsel is placed upon the local or state Government.

Philadelphia had and has an independent Defender Association which has operated successfully. It has the overwhelming support of the community as a whole. However, in 1968 the Association found itself unable to provide the legal representation required because of lack of sufficient private contributions, grants of aid and appropriations from the City Administration. To prevent a total breakdown in law enforcement in Philadelphia and the administration of justice a stop gap appropriation procedure was worked out with the City Administration by President Judge Carroll and representatives of the Defender Association.

The Mayor of Philadelphia, James H. J. Tate, publicly advocated a Public Defender Office. An Ordinance was introduced in City Council and a public hearing scheduled. Opposition came from every non-political direction in Philadelphia. No hearing was held. Negotiations between City representatives and the Association toward support for the Defender Association began to make progress.

The Mayor, however, insisted that because public funds to be appropriated to the Defender Association during the fiscal year 1969-1970 amounted to some $1,160,000 the City should have a substantial number of members on or percentage of the Board of Trustees appointed by the Mayor. The Association, after full consideration and by a close vote of its membership, agreed to enter into the contract prepared by the City Solicitor.

The proposed amendments to the Articles of Incorporation are required in order to effectuate the contract. Relevant provisions of the contract, Exhibit "F", executed on behalf of the Defender Association of the City of Philadelphia are referred to in the fact findings by the Court. The term of the contract is perpetual but either party may terminate this agreement on June 30th of any calendar year provided not less than ninety (90) days written notice of such termination is given.

A further escape clause is provided by paragraph 4 of the contract wherein the City undertakes to compensate the Defender Association for the services to be rendered by the contract in an amount to be determined by Council of the City of Philadelphia from time to time by appropriation. In the event the Defender Association shall determine such appropriation is insufficient it may terminate the agreement upon thirty (30) days written notice.

Findings of Fact

1. The Defender Association was incorporated under the provisions of the Pennsylvania Non-Profit Corporation Law on April 14, 1934 and has since such time provided legal defense services in Philadelphia, Pennsylvania to indigent persons accused of crime.

2. During such time, the Defender Association has been managed by an independent Board of Directors of, in recent years, approximately fifty members; and by an Executive Committee and Officers elected from such Board.

3. This Board of Directors has been composed mainly of members of the Philadelphia Bar, supplemented by interested individuals from local and state government and the Philadelphia community at large.

4. For many years, the United Fund was the sole substantial source of funds for the operation of the Defender Association; however, during the past few years, as a result of certain decisions of the Supreme Court of the United States, such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), grants from certain charitable foundations, notably the Ford Foundation, as well as the provision by the Office of Economic Opportunity for funds for legal service programs, the budget and services of the Defender Association were expanded until by 1967 the combined budget for defender operations, excluding representation of juveniles, was over $600,000.

5. In 1967, the City of Philadelphia contributed $152,000 to the Defender Association. This sum was paid as part of the City's Quarter Sessions Court budget.

6. During 1967 and 1968, the Ford Foundation grant expired and the contract for funds from the Office of Economic Opportunity was not renewed.

7. Appropriate efforts were made by the Defender Association during 1968 to obtain additional funds from the City without success and in the fall of 1968 it became necessary to schedule the reduction and elimination of several Defender services.

8. In November of 1968, a bill was introduced into City Council proposing the Office of Public Defender be appointed by the Mayor, with the approval of City Council. Representatives of the Defender Association met with the City Solicitor and other City representatives in order to express their opposition to the bill and to urge that the Defender Association continue to provide the required services in representing indigents accused of crime.

9. As a result of such meetings, an agreement was reached between the City and the Defender Association, the principal provisions being:

(a) The Board of Directors of the Defender Association is to be changed to consist of thirty directors, ten directors to be chosen by the Mayor with the approval of City Council, ten directors to be chosen by the members of the Defender Association and the final ten directors to be chosen by a majority of the directors selected by the Mayor and a majority of those selected by the Defender Association.

(b) The Board of Directors shall appoint the Chief Defender and First Assistant Defender.

(c) The Chief Defender shall appoint such other professional and non-professional staff as is necessary.

(d) All employees shall be full-time except with the approval of two-thirds of all the members of the Board.

(e) The Defender Association agrees to provide counsel to indigents in various areas of representation, including:

(1) Juvenile delinquency;

(2) Any indictable offense at any stage of the prosecution;

(3) Any offense cognizable before the Municipal Court;

(4) Post conviction proceedings;

(5) Habeas corpus proceedings;

(6) Extradition proceedings;

(7) Probation and parole proceedings; and

(8) Appeals in appropriate cases

The Defender Association will not provide counsel where such representation would present a conflict of interest.

(f) The City is to compensate the Defender Association in an amount determined by appropriation from time to time by City Council.

As a result of such agreement, the Public Defender bill was not acted upon.

10. Provisions of the proposed agreement with the City necessitated certain changes in the Defender Association's

Articles of Incorporation, primarily with regard to the purpose of the corporation and the structure of its Board of Directors.

11. Amendments to the Articles of Incorporation were prepared and presented to a meeting of the members of the Association on March 28, 1969, at which time they were approved.

12. Certain standards for the operation of defender systems throughout the country have been adopted by the American Bar Association and include, *inter alia,* that a defender system should provide "experienced, competent and zealous counsel, independent and free from political or economic influence."

13. While it is necessary to insulate a defender system from undue political control or interference, there have been established in recent years a number of public defender systems and systems whereby management was placed in a board of directors containing substantial representation from both the public and private communities.

14. Although the City's representation on the proposed Board of Trustees is larger than that seen necessary by several of the witnesses, there is no indication that the proposed system will fail to continue to provide independent defender service.

15. The proposed amendments and contract between the Defender Association and the City of Philadelphia appear to provide adequate insulation from undue political influence over the operation of the defender system.

16. The prompt implementation of a competent, adequate defender system in the criminal and juvenile courts of Philadelphia is vital to the sound administration of justice.

17. The budget for the Defender Association for the fiscal year 1969-1970, to provide for the areas of representation set forth in the proposed agreement with the City, is in the amount of $1,263,595, of which $1,160,095 is to be paid by the City of Philadelphia.

18. The proposed defender system is supported by the Board of Governors of the Philadelphia Bar Association; the United Fund, which has indicated its continued annual contribution of $50,000; and the Court Administrator of the Philadelphia Courts.

19. No feasible alternative to the proposed system has been shown.

20. The Philadelphia community is protected from attempts to exert undue political influence over the operation of the proposed Defender Association by competent "watchdogs" such as the Philadelphia Bar Association, United Fund, the Philadelphia judiciary and the Court Administrator, as well as many of the witnesses opposing the proposed amendments and the organizations of which they are members.

DISCUSSION

The Defender Association has made application for approval of certain amendments of its Articles of Incorporation. The amendments should be approved if the Court:

"shall be of the opinion that the amendments are lawful, will be beneficial and not injurious to the community, and do not conflict with the requirements of this act . . ." 15 P.S. 7707

It is the Defender Association's position that the proposed amendments provide an appropriate accommodation between legitimate governmental interests in the substantial amount of funds required to be spent for an adequate defender service in Philadelphia and the professional independence vital to the operation of a sound defender system.

Herman Pollock, longtime Defender, described this position in his testimony:

"We arrived at this not because it's the best system. I don't think it is at all. I would like to have the government give $1,200,000.00 to the Defender organization as it now is, . . .

"But this is a world, sir, in which I think we cannot deal in absolutes and we have to be realistic. And I think that this is a plan with which a decent lawyer can live with as Defender.

"Now, if you are going to get somebody there who isn't decent, if you are going to get a corrupt City government, if you are going to get a corrupt judiciary, this thing is in danger, but if you don't start with the belief that there is corruption all around us, I think that this is a viable, operative instrument.

"The Court: Well, I expect you have to start off with a highly capable Chief Defender, do you not, under the new set-up?

"That is correct.

"The Court: Because of the absolute authority he has with respect to selection and operation of the actual defense of cases, investigation, defense of cases.

"That is right. And I have said to my own Board, with due respect, that whether or not this organization continues as an independent organization is not going to depend on the City; it's going to depend on our own Board that's there now. If they will continue to fight to keep the Association independent, it will be independent, but if they're going to compromise all over the place then it may be our effectiveness may be diminished. No doubt about that.

"If they can muster the necessary community support, in my opinion, should the occasion arise when it is needed to protect the independence of the Defender and the staff, I think there will be no trouble in Philadelphia of doing it."

John J. Cleary, Esq., Deputy Director of the National Defender Project, a grant activity of the National Legal Aid and Defender Association, testified as to the operation of various forms of defender systems throughout the United States. In his opinion any type of defender or system, be it public, private or mixed can provide independent, competent service. The obvious reservation is that the system must be free of political control and interference and adequately financed. He is familiar with the past operation of the Defender Association and its contract with the City of Philadelphia. In his opinion Philadelphia has had an outstanding defender system. The agreement involved in this controversy has been reviewed by his group and approved as being consistent with the recognized standards and a model balancing of public-private interest. Cleary described it as an "independent system" for handling legal representation of the indigent.

Edward J. Blake, Esq., the Court Administrator, appeared officially to state his endorsement of the proposed amendments which have the effect of continuing the services to the community of the Defender Association. Speaking for President Judge Vincent A. Carroll as well, he testified that the amendments would be beneficial to the administration of criminal justice in the City of Philadelphia where 60-65% of defendants in criminal cases are indigent. He looks upon the proposed changes in the organization of the Association as not affecting its independence. On the contrary it not only maintains its independence but for the first time will be adequately financed and in a position to give full and complete attention to the legal requirements of indigent defendants including juveniles.

Joseph DuBarry, President of the Association, recited the problems of the Defender Association during the last several years in attempting to handle the burgeoning case load thrust upon the organization, and negotiations with the City to obtain adequate financing. By late 1968 the financial situation was critical. In his opinion the contract with the City of Philadelphia does not seriously impair the independence of the organization. Upon approval of the proposed amendments the Association will have the necessary finances.

The contract representative of the City was Pace Reich, Esq., Deputy to the City Solicitor. Clearly the City would not negotiate the several questions raised by the objectors such as the extent of City representation and tenure of the Chief Defender. On the other hand, assurance was offered that the only interest of the City administration was to see to the expenditure of the substantial sums of money to be appropriated to the Association.

Within the past week counsel for the objectors and earlier counsel for the American Civil Liberties Union, Greater Philadelphia Branch, furnished the Court excellent briefs contra the amendments to the Charter. We appreciate the highly competent and dedicated advocacy of Bernard L. Segal, Esq. and Louis B. Schwartz, Esq. who advanced the position of the objectors throughout the four day hearing. Both are former members of the Association and vigorously opposed the approval of the contract with the City.

The objectors state that from the negotiations with the City there resulted a "compromise", embodied in a contract between the City and the Defender Association. The compromise envisioned a "partnership" in control of the defense. City Hall would designate 10 directors. The Defender Association would designate 10. These 20 would designate an additional 10. On its face, this arrangement gives City Hall 50% control of the Defender Association. In practice, it would give City Hall total domination, owing to the likelihood that highly-motivated political appointees would attend and vote en bloc at all critical points, especially in the selection of the Chief Defender and in establishing personnel policy. Practical domination would also be assured by the normal division of opinion among "Independent" directors combined with the expectable political and economic links to City Hall of many directors having no overt connection with the political authorities.

Testimony in this case established City Hall's purpose and power to dominate, through the force-out of the then Defender for political reasons, which was made a condition of negotiations between the City and the Defender Association, and through the course of negotiations in which even the minimal safeguards in the contract were extracted from a reluctant city administration.

Uncontradicted testimony in this case, including testimony of the petitioners' own witnesses, established that the degree of control allotted to the city exceeds any legitimate interest the City could have in the premises. Uncontradicted testimony established that the City's legitimate interests could be fully protected by contract stipulations regarding the service to be performed, audits and other purely fiscal supervision, and continuance of the policy already firmly established of "goldfish-bowl" operation with a standing invitation to any interested official to attend directors' meetings. Uncontradicted testimony established that full information about the Defender operation has always been made available, and that no City official had ever claimed otherwise.

The amendments to the Defender Association Charter, here offered for the approval of the Court, are designed to carry out the contract executed by the Association under the gun of the City's threat to cut off funds completely. Approval by the membership of the Association was by a close vote of 19-16. The tenuousness of the "independent" position in the proposed organization is exposed by an analysis of the amended articles: virtually every feature of the organization and operation of the "new" Defender Association, including its contract with the City, could be altered or abandoned without the concurrence of a single director representing the Association. The only power unequivocally remaining in the Association's directors is the power to fix the annual dues of members.

They view the contract issue as being whether the government, which is constitutionally required to finance the defense of the indigent, shall also manage the defense or exercise large influence over the defense, and state that it is significant in this connection that the present proposals

for Philadelphia are unique in subjecting the appointment and operation of the defender to a Mayor who also appoints the Police Commissioner and prosecutor (the City Solicitor). In other counties the County Commissioners who designate the public defender have no such direct links with police and prosecution. One might add that if the District Attorney should happen to be subject to control by the Mayor the Chief Administrator would have the potential right of control over both the prosecution and the defense. Of course, anything can or may happen in this City but the Court believes charges of this type are purely speculative and without any apparent foundation in fact.

Of course, there may not be a "Partnership" between prosecuting authorities and counsel for the indigent accused. The Defender Association must provide independent and effective counsel. One can appreciate the concern of the objectors that a conflict of interest situation or situations can develop from such a "Partnership" should it exist but this Court believes it does not.

Clearly a portion of the active and interested element of the community have strong opinions with respect to the question before the court. But does the division involve the goals of the defender system in Philadelphia—it does not. Both sides firmly advocate an operation that meets all the accepted standards for independent and equal representation of those persons entitled to counsel by the constitution and court decisions. The opposition is based upon belief or perhaps no more than speculation that a long time politically oriented Mayor will dominate and control policies, procedures, and hiring in the Defender Association. For this Court to find that he will or will not would be speculative as well.

The Court has carefully listened to the testimony of the objectors most of whom are professional friends or acquaintances. We don't question their sincerity. One might pick out for special mention the testimony of several but all followed the same ideological line. All were concerned not with the continuation of the same standards of representation by the Defender Association but motivated by a conviction that the City Administration intended to control and change the character of our nationally recognized defender group.

Considering alone the testimony of Mr. Cleary for the proponents and Professor Dorsen for the objectors, both of whom are most familiar with defender systems and not from this City, one concludes that success, failure, or inadequacy in representation of the indigent defendant depends largely upon independence of operation. That may be considered an oversimplification of the question. The point is that no matter who appoints the Directors, Trustees, or Public Defender, that in itself does not assure a community that it will have a first class defender office. The success or failure of the Defender Association will depend almost completely upon the selection of thirty members of the Board of Directors, the choice of a Chief Defender and his selection of assistants. This Court believes that the Chief Defender and his assistants should have the protection of "tenure" in office as advocated by the present members of the Association. Anything less will be a clear indication that the defender organization is suspect. The Association must offer lawyers career service opportunity.

The Court has reviewed carefully the learned and dynamic brief presentation of the objectors and finds itself in complete agreement with the philosophy and guidelines

presented. However, we cannot accept the argument that the revised Charter would create a corporate monster outside the contemplation of the Non-profit Corporation Law which is clearly unlawful, not beneficial and would be injurious to the community. Again we say this is pure speculation on the part of the objectors and contrary to the belief of a majority of the members of the Association, the Court Administrator, and the President Judge of the Court of Common Pleas and the National Defender Project.

The objectors argue that the question of prejudicial organization of the Defender Corporation is not prematurely raised. It is not. Of course, in a sense, time will tell and individual defendants can question the adequacy of defense counsel including conflict of interest for years in the future. This Court is not tempted to by-pass what counsel refer to as the novel and difficult central issue in this case by saying that the issue is raised "prematurely." To do so would have a disruptive and devastating effect upon the constitutional administration of justice in our community.

We agree that an amended Charter should not be approved that involved a compromising "Partnership" with City Hall which would by the application of professional ethics and the Constitution require the intelligent consent by a client before undertaking to represent him. Of course, it would be impracticable to operate a defender organization on that basis. We do not believe and do not find or "predict" that such a need will arise. At this point in their argument able counsel for the objectors tend to overreach too enthusiastically and argue beyond any reasonable examination and interpretation of the record prepared at the hearing on this application.

We do not decide the problem before the Court on the basis that the contract with the City requiring an amendment of Articles of Incorporation represent the better choice of two evils. Actually in our opinion the Defender Association service to the community will be more beneficial than in the past. Believing that the Board of Directors will be "independent" the Association will now be adequately financed and in a position to meet the increasing demand for legal representation as required by the Constitution and court decisions. The community will have the services of an established and respected organization backed up by the Courts of Philadelphia County and an intelligent and aggressive organized Bar. Community organizations and the objectors have supported the Association in the past and will continue to do so if it continues to be an outstanding independent organization. A new dimension appears in the new organizational picture as well. For the first time the Association will be in a position to offer prospective members of the defender staff a competitive and adequate salary or rate of compensation and hopefully a career.

The testimony offered at the hearings and arguments advanced by counsel require one to stop and think. One must reason carefully in evaluating the merits of the conflicting positions. The final judgment of this Court is that the application should be approved. The burden of persuasion by a preponderance of the evidence has been met by the Applicant Defender Association of Philadelphia.

The Court orders each party to pay their own costs.

Conclusions of Law

1. This Court has jurisdiction over the parties to and subject matter of this action.

2. Applicant has complied with the requirements of the Non-Profit Corporation Law (15 P. S. 7001 et seq.) concerning the approval of proposed amendments of articles of incorporation.

3. The proposed amendments are lawful.

4. The proposed amendments are beneficial and not injurious to the community.

The Court has simultaneously with the filing of this Adjudication filed a Decree approving the Amended Articles of Incorporation of the Defender Association of Philadelphia.

BY THE COURT:

McDEVITT, *J.*

Date filed: August 8, 1969.

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-552.

LOUIS B. SCHWARTZ and BERNARD L. SEGAL,
Petitioners,

v.

DEFENDER ASSOCIATION OF PHILADELPHIA,
Respondent.

(In re Amendments of Articles of Incorporation of Defender Association)

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF OF RESPONDENT DEFENDER ASSOCIATION OF PHILADELPHIA IN OPPOSITION TO THE PETITION AND APPENDIX.

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QUESTION PRESENTED.

Does the mere fact that the board of directors of a non-profit corporation, organized to provide legal representation for indigent persons accused of crime, is composed of persons representing both public and private interests violate the Sixth and Fourteenth Amendments to the Constitution of the United States when the highest court of a state has found, after a full evidentiary hearing and careful consideration of the record, that the organizational structure of the defender corporation adequately safeguards the independence of the defender services and protects against potential conflicts of interest in the representation of indigent criminal defendants?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 707 of the Pennsylvania Non-Profit Corporation Law of 1933, Act of May 5, 1933, P. L. 289, art. VII, § 707, 15 P. S. § 7707, provides in pertinent part:

> ". . . [A non-profit] corporation or its representative shall present an application for the amendment of its articles to the court, and shall present to the court the articles of amendment. . . . The court shall consider the application. It may hear the evidence on behalf of the applicants and against the application, if there by any. . . . If the court shall be of the opinion that the amendments are lawful, will be beneficial and not injurious to the community, and do not conflict with the requirements of this act, the court shall so certify on the articles of amendment, and shall order and decree thereon that the articles of amendment are approved."

The Sixth and Fourteenth Amendments to the Constitution of the United States are set forth at page 3 of the Petition.

STATEMENT OF THE CASE.

The facts necessary to this Court's consideration of the issues raised by the petition for a writ of certiorari are fully set forth in the Opinion of the Supreme Court of Pennsylvania, 307 A. 2d at 907-909 (Appendix to Petition, pp. 2a-6a).

Despite petitioners' statement that the facts are largely "undisputed" and "recited in the opinions below", their factual statement is keyed to the transcript of testimony in the trial court and they seek to reargue the significance of the referenced statements in this Court. Moreover, petitioners attempt to supplement the record by reference to newspaper accounts of facts referred to in the dissenting opinion in the court below, but admittedly not of record in this case (Petition, pp. 7-8). Respondent will not argue either the relevance or probative value of newspaper reports of the alleged attitudes of Philadelphia public officials to this case. However, it is highly improper for petitioners to argue "facts" not found in the record in this Court.[1]

1. The apparent importance of such non-record "facts" to petitioners' position here is underscored by the argument advanced at pages 25-26 of the Petition.

REASONS FOR REFUSING TO ISSUE THE WRIT.

There Are No Important or Special Reasons for Granting the Writ.

This matter concerns an application by the Defender Association of Philadelphia for approval of certain amendments to its Articles of Incorporation under the Pennsylvania Nonprofit Corporation Law of 1933, Act of May 5, 1933, P. L. 289, 15 P. S. § 7001 *et seq.*[2] The Association sought court approval of changes in its organizational structure which were necessary to effectuate a contract for operating funds with the City of Philadelphia.[3] Following a full evidentiary hearing, the Association's application was considered by three levels of the Pennsylvania judiciary, including the Supreme Court of Pennsylvania; in each court, petitioners raised their concern that the changes in the Association's organizational structure would destroy the independence of the Association and introduce an impermissible potential conflict of interest into the defender's representation of indigent criminal defendants. While acknowledging the need for an independent defender free of potential conflicts, the courts below found as a matter of fact that the record demonstrated no threat to the Association's independence by reason of the organizational changes and, thus no actual potential for a conflict of interest.

---

2. In 1972, the General Assembly repealed the 1933 Act involved here and enacted a new statute regulating non-profit corporations in Pennsylvania. Act of November 15, 1972, P. L. 271, 15 P. S. § 7101 *et seq.* (Special Supp. 1972). Under the 1972 Act, amendments to the articles of incorporation of non-profit corporations are not submitted to a court, but only require the approval of the corporations' membership. *See* 15 P. S. §§ 7901-7906.

3. A copy of the agreement between the City of Philadelphia and the Defender Association appears in the Appendix, *infra,* at pp. 1a-6a.

However, in approving the amendments, the Pennsylvania Supreme Court did not place a perpetual blessing on the Association and plainly mandated the state courts to remain vigilant in assuring the independence of the public defender. The Opinion of the court below is qualified in the following terms:

> "Our holding in no way precludes the possibility of judicial relief in future if the occasion should arise. As only one example, should it appear that pressure has been brought to bear on Association attorneys to persuade their clients to forego jury trials or appeals in order to avoid the cost to the City that they entail, a clear case of unconstitutional conflict of interest would be made out, not to speak of the standards of professional responsibility. Evidence of improper influence or pressure, whether overt or covert, will trigger an appropriate judicial response." 307 A. 2d at 912 n. 21 (Appendix to Petition at p. 13a).

Thus, the constitutional proposition for which petitioners urge "vindication" was clearly recognized below. In reality petitioners seek still another opportunity to argue the evidence in this case, and hope to overturn the finding of the courts below respecting the Association's independence. In short, petitioners have failed to demonstrate any important or special reason why a writ of certiorari should issue.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD W. MADEIRA, JR.,
JEFFERY CHARLES HAYES,
Attorneys for Respondent,
Defender Association of
Philadelphia.

Of Counsel:

PEPPER, HAMILTON & SCHEETZ.

Certificate of Service.

I hereby certify that on this 26th day of October, 1973, three copies of the Brief of Respondent Defender Association of Philadelphia In Opposition to the Petition were mailed, first class postage prepaid to Bernard L. Segal, Suite 200, 1427 Walnut Street, Philadelphia, Pennsylvania 19102, Attorney for Petitioners. I further certify that all parties required to be served have been served.

/s/ Edward W. Madeira, Jr.,
2001 The Fidelity Building,
123 South Broad Street,
Philadelphia, Pennsylvania. 19109

October 26, 1973

APPENDIX.

Excerpt From Brief of Appellee, Defender Association of Philadelphia, in the Supreme Court of Pennsylvania (Appendix A).

* * *

THIS AGREEMENT, made this 28th day of January, 1969, by and between the CITY OF PHILADELPHIA (called "City"), and the DEFENDER ASSOCIATION OF PHILADELPHIA (hereinafter called "Association").

WITNESSETH:

WHEREAS, the Association has been engaged in the defense of persons accused of crimes for a period of years; and

WHEREAS, the Association has been unable to secure adequate funds to defend persons accused of crimes or charged with delinquency who are unable to secure private counsel; and

WHEREAS, agreement has been reached whereby the City, under certain terms and conditions, will provide funds for such purposes.

NOW, THEREFORE, the parties to this agreement intending to be legally bound agree as follows:

1. The Association shall amend the Articles of Incorporation and/or its by-laws as appropriate to provide as follows:

(a) That the Association shall be governed by a Board of Directors consisting of thirty directors, ten

directors to be chosen by the Mayor with the approval of City Council, and ten directors to be chosen by the members of the Defender Association of Philadelphia, and ten directors by agreement between a majority of the directors selected by the Mayor and a majority of the directors selected by the members of the Defender Association of Philadelphia. Directors shall serve for a term of three years. The members of the initial Board of Directors shall be divided into classes as follows:

(i) There shall be three (3) members of Class A in each group, which members shall serve for the period of one (1) year.

(ii) There shall be three (3) members of Class B in each group, which members shall serve for the period of two (2) years.

(iii) There shall be four (4) members of Class C in each group, which members shall serve for the period of three (3) years.

(b) That the Board of Directors shall select one of their members as Chairman of the Board and of the Executive Committee. The Executive Committee shall consist of thirteen directors, including the chairman and twelve others, of whom four shall be chosen by the directors selected by the Mayor, four shall be chosen by the directors selected by the members of the Defender Association of Philadelphia and four shall be chosen by the other ten directors. The Board of Directors shall select such officers as it may determine and shall appoint the Chief Defender and the First Assistant Defender. The Chief Defender shall appoint such professional, investigative and clerical

staff as are necessary to assure the effective performance of his duties. Except with the approval of two-thirds (⅔) of all the members of the Board of Directors in specific instances, all employees shall be full-time employees.

(c) That the Chief Defender shall be a lawyer in active practice before the Courts of Record of the County of Philadelphia and that he shall have at least five (5) years experience in the active practice of the law.

2. The Association agrees to provide counsel in criminal or quasi-criminal matters to persons unable to obtain an attorney because they lack financial resources. The provision of counsel shall include such investigative, expert or other services as are necessary to assure effective assistance. The areas of representation shall include the following:

(a) Juvenile delinquency;

(b) Any indictable offense at any stage of the prosecution;

(c) Any offense cognizable before the Municipal Court;

(d) Post conviction proceedings;

(e) Habeas corpus proceedings;

(f) Extradition proceedings;

(g) Probation and parole proceedings; and

(h) Appeals in appropriate cases.

The Association shall provide representation in cases assigned by the courts or in cases in which the Chief

Defender determines that a person lacks the financial ability to retain counsel. The Association shall not supply representation to a person accused of crime or charged with delinquency where such representation would constitute a conflict of interest or where the Association determines for other sufficient reason not to represent such person.

3. The services to be rendered under this contract shall be rendered in a professional and ethical manner.

4. The City shall compensate the Association for the services rendered hereunder in an amount to be determined by the Council of the City of Philadelphia from time to time by appropriation. In the event that the Association shall determine that any such appropriation is insufficient it may terminate this agreement upon thirty (30) days written notice.

5. The term of this contract shall be perpetual; provided, however, either party may terminate this agreement on June 30th of any calendar year provided not less than ninety (90) days written notice of such termination is given.

6. Any person who is responsible for the support of any person under the Act of June 24, 1937, P. L. 2045, § 3, as amended (62 P. S. 1973), represented by the Defender shall be liable to the City of Philadelphia for the actual reimbursement of funds expended by the City in connection with that representation for whatever specific expenditure the Defender deems necessary or desirable in that matter. Where any person defended by the Defender can pay for some part of his defense, those funds shall be paid into the City Treasury.

7. The City shall have the right to audit the books and records of the Association. For this purpose such books and records shall be made available to representatives of the Finance Director of the City and the City Controller at such reasonable times as are requested by any such representatives.

8. This contract is entered into under and subject to the provisions of all Acts of Assembly of the Commonwealth of Pennsylvania, the Philadelphia Home Rule Charter and all ordinances of the City of Philadelphia as amended. In the performance of this agreement, no person shall discriminate, nor permit discrimination, against any person because of race, color, religion or national origin.

9. Upon appropriation of funds by City Council for the purpose of this agreement the Association waives any and all right to compensation under a certain Order entered on January 15, 1969 by the Honorable Vincent A. Carroll, President Judge of the Court of Common Pleas of Philadelphia directing the association to defend certain parties and further directing the City to pay for such defense; reserving only to the Association the right to repay any indebtedness and the interest thereon incurred for the purposes set forth in this agreement in such interim period out of such appropriated funds, or if such funds are insufficient therefor, then out of compensation payable under the Order.

10. It is expressly understood and agreed by and between the parties that this agreement sets forth all the promises, agreements and understandings between the parties and that no alteration, amendment, change or addition hereto, shall be valid unless in writing and signed by the parties.

IN WITNESS WHEREOF, the parties agree to set their hands and seals the day and year aforesaid.

CITY OF PHILADELPHIA

By: EDWARD G. BAUER, JR.
City Solicitor

DEFENDER ASSOCIATION OF PHILADELPHIA

By: JOSEPH N. DUBARRY, IV
President

Attested to:

JOS. N. BONGIOVANNI, JR.
Secretary